

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBINSON TOWNSHIP, Washington)	Docket No.
County, Pennsylvania, BRIAN COPPOLA,)	<u>TYPE OF PLEADING:</u>
Individually and in his Official Capacity as)	PETITION FOR REVIEW IN THE
SUPERVISOR of ROBINSON)	NATURE OF A COMPLAINT FOR
TOWNSHIP, TOWNSHIP OF)	DECLARATORY JUDGMENT AND
NOCKAMIXON, Bucks County,)	INJUNCTIVE RELIEF
Pennsylvania, TOWNSHIP OF SOUTH)	
FAYETTE, Allegheny County,)	<u>Filed on behalf of:</u>
Pennsylvania, PETERS TOWNSHIP,)	Petitioners
Washington County, Pennsylvania,)	
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COMMONWEALTH OF)	
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PUBLIC UTILITY COMMISSION,)	Pa. I.D. No. 72947
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ROBINSON TOWNSHIP, Washington
County, Pennsylvania, et al.

vs.

**PETITION FOR REVIEW IN THE
NATURE OF A COMPLAINT FOR
DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF**

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBINSON TOWNSHIP, Washington)	
County, Pennsylvania, et.al.)	Docket No.
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Petitioners,)	
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COMMONWEALTH OF)	
PENNSYLVANIA, et al.)	
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**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

AND NOW, Petitioners, Robinson Township, Washington County, Pennsylvania, Brian Coppola, Peters Township, Washington County, Pennsylvania, David M. Ball, Township of Nockamixon, Bucks County, Township of Cecil, Washington County, Mount Pleasant Township, Washington County, Borough of Yardley, Bucks County, Township of South Fayette, Allegheny County, Delaware Riverkeeper Network, and Maya Van Rossum, the Delaware Riverkeeper, and Mehernosh Khan, M.D., by and through their attorneys, file the within Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief against Respondents, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Robert F. Powelson, Office of the Attorney General of the Commonwealth of Pennsylvania, Linda L. Kelly, Pennsylvania Department of Environmental Protection and Michael L. Krancer, and in support thereof set forth as follows:

INTRODUCTION

1. On February 14, 2012, Pennsylvania Governor Thomas W. Corbett signed HB 1950 into law as Act 13 of 2012. (hereinafter, "Act 13"). Act 13 amends the Pennsylvania Oil and Gas Act (hereinafter, "Oil and Gas Act"), 58 P.S. § 601.101 et seq., to establish, in part, a

one-size-fits-all zoning scheme for oil and gas development that applies to every zoning district in every political subdivision in Pennsylvania.

2. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit without interference from the government. *See*, PA. CONST. Art. I, Sec 1. In certain limited circumstances, the Commonwealth may constitutionally employ its police powers in a manner that may infringe upon citizens' property rights. However, the powers of the Commonwealth are not unlimited and will be deemed an arbitrary exercise of the Commonwealth's police powers prohibited by Article I, Section 1 of the Pennsylvania Constitution if the enactment is not designed to protect the health, safety and welfare of the community. Moreover, if the law is designed to benefit or affect one industry or locality to the exclusion of others, it will be designated an unconstitutional "special law" in violation of Article III, Section 32 of the Pennsylvania Constitution. Article III, Section 32 of the Pennsylvania Constitution was adopted to end "[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals [corporations] or favored localities." *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001).

3. The Pennsylvania General Assembly enacted Act 13, in part, to overturn the Pennsylvania Supreme Court's 2009 decision in *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009). The Court held that municipalities could use zoning powers to regulate the location of oil and gas development in their communities. The Pennsylvania Supreme Court was asked to consider whether the Oil and Gas Act preempted municipalities from enacting zoning ordinances to plan for the development of oil and gas drilling in various parts of the Borough of Oakmont. *Id.*

4. The Supreme Court drew a “where versus how” distinction between zoning and land use classifications that were enacted to preserve the character of neighborhoods and to plan for community development and the technical regulations governing the manner in which an industry operates. *Id.* at 224-25, 865-66. The Court held that:

While the governmental interest involved in oil and gas development and in land-use control at times may overlap, ***the core interests in these legitimate governmental functions are quite distinct.*** The state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources of the state. A county’s ***interest in land-use control***, in contrast, is one of more orderly development and ***use of land in a manner consistent with local demographic and environmental concerns.***

Id. at 225, 865. (emphasis added).

5. Following the Court’s decision in *Huntley & Huntley*, the Pennsylvania Commonwealth Court in *Penneco Oil Company* followed the Pennsylvania Supreme Court’s rationale by finding that local zoning regulations relative to oil and gas activities are a proper use of the local governments’ police power stating that, “... the most salient objections underlying restrictions on oil and gas drilling in residential districts appeared to be those pertaining to preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses.” *Penneco Oil Company, Inc. v. County of Fayette*, 4 A.3d 722, 726 (Pa. Commw. Ct. 2010) (*cert. denied*, Pa. Jan. 6, 2012).

6. Following the reasoning set forth by the Pennsylvania Supreme Court, the Commonwealth Court in *Penneco Oil Company* also found that the police powers’ objectives are served by proper local regulations regarding regulating drilling in residential areas that are enacted to serve the safety and welfare of its citizens, “encouraging the most appropriate use of the land throughout the borough, conserving the value of property, minimizing overcrowding, traffic, congestion and providing adequate open spaces.” *Id.*

7. In response to the holdings of *Huntley & Huntley* and *Penneco Oil Company*, the Pennsylvania General Assembly specifically inserted § 3304 in Act 13 that constrains municipalities' authority over "where" gas drilling operations may be located within the municipal borders.

8. Despite the General Assembly's efforts, Act 13 cannot override Petitioners' statutorily defined mandate of how zoning is implemented and approved at the local level, as defined in the Municipalities Planning Code (hereinafter, "MPC"), 53 P.S. § 10101 *et seq.* The MPC is the tool by which the Constitutional directives of the U.S. Supreme Court and Pennsylvania Supreme Court are accomplished.

9. In contrast to the Courts' decisions in *Huntley & Huntley* and *Penneco Oil Company* which define a proper use of the sovereign's police power, Act 13's broad brush approach and failure to account for the health, safety and welfare of citizens, the value of properties, adequate open spaces, traffic, congestion, the preservation of the character of residential neighborhoods and beneficial and compatible land uses, results in an improper use of the Commonwealth's police power and is therefore unconstitutional.

10. Act 13 cannot escape the Constitutional scrutiny that accompanies all zoning enactments. The Commonwealth's police power to zone is constitutionally limited to enacting regulations for the sole purpose of protecting the health, safety and welfare of its citizens.

11. By attempting to preempt and supersede local regulation of oil and gas operations, the Pennsylvania General Assembly, through Act 13, has assumed the power to zone for oil and gas operations, which is manifested through the promulgation of a uniform set of land-use regulations governing oil and gas operations throughout the Commonwealth. By crafting a single set of statewide zoning rules applicable to oil and gas drilling throughout the Commonwealth, the Pennsylvania General Assembly provided much sought-after predictability for the oil and gas

development industry. However, it did so at the expense of the predictability afforded to Petitioners and the citizens of Pennsylvania whose health, safety and welfare, community development objectives, zoning districts and concerns regarding property values were pushed aside to elevate the interests of out-of-state oil and gas companies and the owners of hydrocarbons underlying each property, who are frequently not the surface owners.¹

12. In addition, Act 13 constitutes an unconstitutional “special law” in violation of the equal protection principles embodied in the Pennsylvania Constitution, Article III, Section 32. It creates a classification between the oil and gas industry and other taxpaying citizens, businesses and industries by giving the oil and gas industry special treatment and essentially exempting it from the local zoning controls and regulatory procedures otherwise applicable to all other applicants seeking to develop land within a municipality. Act 13 also serves to treat municipalities and its citizens differently depending upon a number of factors including population, physical location and budgetary constraints, violating equal protection principles. These distinctions bear no rational relationship to any legitimate state interest and cannot be justified on the basis of public health, safety or welfare.

13. Furthermore, Act 13 unconstitutionally violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources. Municipalities are agents of the Commonwealth and are therefore trustees entrusted with the duty to conserve and maintain Pennsylvania’s public natural resources for the benefit of its citizens.

¹ Because of Pennsylvania’s history of gas production, it is not unusual for subsurface interests to have been severed generations ago, resulting in the surface estate and oil and gas passing through separate chains of title. The person who owns the oil and gas rights underlying the property has the implied right to use the surface estate to access and extract these natural resources. *Consol. Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. 2005). Under Pennsylvania law, the gas owner has the implied right to go upon the surface if it is necessary to access and remove the gas. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893). This rule’s relationship to Act 13 serves to further frustrate zoning as non-taxpaying citizens of a municipality are free to develop a municipality as they and the industry see fit, leaving municipal officials to helplessly look on without any input or oversight.

14. Act 13 authorizes drilling activities, water impoundments and pipelines as “permitted” uses in all zoning districts. As municipalities can expect hundreds of wells, numerous impoundments, miles of pipeline, several compressor and processing plants, all within its borders, they will be left to plan around rather than plan for orderly growth. In this regard, zoning rules will no longer be applied for industrial drilling activities and zoning rules, comprehensive plans and orderly development within municipalities will now be the exception and no longer the rule.

15. Through Act 13, the Pennsylvania General Assembly has mandated that Municipal Petitioners must:

- a. modify their zoning laws in a manner that fail to give consideration to the character of the municipality, the needs of its citizens and the suitabilities and special nature of particular parts of the municipality; 53 P.S. § 10603(a).
- b. modify their zoning laws in a manner that would violate and contradict the goals and objectives of Petitioners’ comprehensive plans; 53 P.S. § 10605.
- c. modify zoning laws and create zoning districts that violate Petitioners’ constitutional duties to only enact zoning ordinances that protect the health, safety, morals and welfare of the community; *See*, 53 P.S. § 10604.
- d. conduct Public Hearings to gather citizen comments regarding authorized oil and gas development in residential and commercial districts as a permitted use by right even though such comments and evidence cannot be considered by Petitioners who, by state law, must approve the state’s zoning scheme regardless of the findings of the elected officials in violation of 53 P.S. § 10908.
- e. conduct Public Hearings negating citizens’ due process rights to meaningful participation in proceedings involving the adoption of a zoning ordinance; *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010).
- f. pass zoning laws without affording its citizens due process that will result in the zoning laws being *void ab initio*; *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007).
- g. allow heavy industrial uses in all zoning districts, including residential areas, near homes, schools, churches and nursing homes in violation of 53 P.S. § 10605.
- h. must enact zoning laws that do not allow for the orderly development of their respective communities; and, *See*, 53 P.S. § 10605.

- i. adopt zoning laws that are an improper use of the sovereign's police powers in violation of the U.S. Constitution and Pennsylvania Constitution.

16. The citizens of Petitioners' communities have purchased homes, built churches, daycare centers and hospitals in reliance upon zoning districts. These districts allow for orderly development and compatible uses, and serve to preserve the value of their investments, the nature of the district and their overall health, safety and welfare. Act 13, in violation of the U.S Constitution and Pennsylvania Constitution, removes all of the aforementioned goals and protections and is an improper and arbitrary use of the Commonwealth's police power.

STATUTORY AUTHORITY AND JURISDICTION

17. Petitioners bring the instant Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the "Declaratory Judgments Act," 42 Pa.C.S. § 7531 et seq. and Pennsylvania Rules of Civil Procedure 1602 et seq.

18. Petitioners request that this Honorable Court declare that provisions of Act 13 violate the United States Constitution and the Pennsylvania Constitution and enjoin the implementation of the unconstitutional provisions of Act 13.

19. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761 because this action has been filed against the Commonwealth government and officers thereof acting in their official capacities.

SUMMARY OF ARGUMENT

20. In this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief, Petitioners assert that:

- a. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th Amendment to the United States Constitution as Act 13's zoning scheme is an improper exercise of the Commonwealth's police power that is not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania;

- b. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution because it allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts.
- c. Act 13 violates Article I, Section 1 of the Pennsylvania Constitution as Act 13's allowance of oil and gas development activities as a permitted use by right in every zoning district renders it impossible for municipalities to create new or to follow existing comprehensive plans, zoning ordinances or zoning districts that protect the health, safety, morals and welfare of citizens and to provide for orderly development of the community in violation of the MPC resulting in an improper use of its police power;
- d. Act 13 violates Article III, Section 32 of the Pennsylvania Constitution because Act 13 is a "special law" that treats local governments differently and was enacted for the sole and unique benefit of the oil and gas industry;
- e. Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth's eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.
- f. Act 13 violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources.;
- g. Act 13 violates the doctrine of Separation of Powers because, through its provision that allows for advisory opinions, Act 13 permits an Executive agency, the Pennsylvania Public Utility Commission, to play an integral role in the exclusively Legislative function of drafting legislation;
- h. Act 13 violates the doctrine of Separation of Powers because it entrusts an Executive agency, the Pennsylvania Public Utility Commission with the power to render opinions regarding the constitutionality of Legislative enactments, infringing on a judicial function. *See, Commonwealth v. Allshouse*, 33 A.3d 31 (Pa. Super. 2011);
- i. Act 13 unconstitutionally delegates power to the Pennsylvania Department of Environmental Protection without any definitive standards or authorizing language.
- j. Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.
- k. Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.

- l. Act 13 is an unconstitutional “special law” in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals’ ability to disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry.
- m. Act 13’s restriction on health professionals’ ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution.

PARTIES

21. Petitioner, Robinson Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 8400 Noblestown Road, McDonald, Pennsylvania 15057.

22. Petitioner, Brian Coppola, in his official capacity, is the Chairman of the Board of Supervisors of Robinson Township, Washington County, Pennsylvania, maintains an official address of 8400 Noblestown Road, McDonald, Pennsylvania 15057. Petitioner Brian Coppola also files suit in his capacity as a citizen of the Commonwealth of Pennsylvania.

23. Petitioner, Peters Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 610 E. McMurray Road, McMurray, Pennsylvania, 15317.

24. Petitioner, David M. Ball, in his official capacity, is a Councilman of Peters Township, Washington County, Pennsylvania, maintains an official address of 610 E. McMurray Road, McMurray, Pennsylvania, 15317. Petitioner David Ball also files suit in his capacity as a citizen of the Commonwealth of Pennsylvania.

25. Petitioner, Township of South Fayette, Allegheny County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 515 Millers Run Road, Morgan, Pennsylvania, 15064.

26. Petitioner, Township of Cecil, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 3599 Millers Run Road, Cecil, Pennsylvania, 15321.

27. Petitioner, Mount Pleasant Township, Washington County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 31 McCarrell Road, Hickory, Pennsylvania, 15340.

28. Petitioner, Township of Nockamixon, Bucks County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 589 Lake Warren Road, Ferndale, Pennsylvania, 18921.

29. Petitioner, Borough of Yardley, Bucks County, is a political subdivision of the Commonwealth of Pennsylvania, with an address of 56 South Main Street, Yardley, Pennsylvania, 19067.

30. All of the foregoing Petitioners are referred to hereinafter as "Municipal Petitioners."

31. All the Municipal Petitioners have zoning ordinances in place that allow for oil and gas activities within its municipalities which provide for a balance between the safety of its citizens, orderly development of the community and the development of oil and gas drilling. Collectively, the Municipal Petitioners have close to 150 unconventional wells drilled within their borders.

32. Petitioner Delaware Riverkeeper Network (DRN) is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the

entire Delaware River Basin watershed. DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 8,000 members with interests in the health and welfare of the Delaware River and its watershed. DRN brings this action on its own behalf and on behalf of its members, board, and staff.

33. Petitioner Maya van Rossum is the Delaware Riverkeeper, a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper, Maya van Rossum, advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats.

34. Both the Delaware Riverkeeper and DRN's members enjoy the water quality values of the Delaware River Basin. DRN members live, work, and recreate in the lands and waters of the Delaware River Basin. DRN members boat, fish, canoe, birdwatch, hike, and participate in other professional, commercial, scientific, and recreational activities near or on the Delaware River and its tributaries and throughout the watershed. Many of DRN's members obtain their water for domestic, agricultural, and other purposes from groundwaters, streams and other surface waters within the Delaware River Basin.

35. Petitioner Mehernosh Khan, M.D., is a practicing medical doctor and resident of the Commonwealth of Pennsylvania. Dr. Khan operates a family practice in Monroeville, Allegheny County, where he treats patients in an area that may likely come into contact with oil and gas operations. Dr. Khan will be adversely affected and irreparably harmed if Act 13's health care provider gag order provisions are allowed to take effect.

36. The Delaware Riverkeeper, DRN's members, and the other individual Petitioners will be adversely affected if Act 13 is allowed to take effect. Each have an interest in, *inter alia*, the preservation of their constitutional rights, the enactment of substantive valid zoning

provisions, and in Municipal Petitioners being able to carry out their constitutional authority, and in the maintenance of separation of powers. If Act 13 is allowed to take effect, it will cause irreparable harm to these interests.

37. Respondent, Commonwealth of Pennsylvania, has an address of 225 Main Capitol Building, Harrisburg, Pennsylvania, 17120.

38. Respondent, Pennsylvania Public Utility Commission, is a regulatory agency of the Commonwealth of Pennsylvania, with an address of 400 North Street, Keystone Building, Harrisburg, Pennsylvania, 17120.

39. Respondent, Robert F. Powelson, in his official capacity, is the Chairman of the Pennsylvania Public Utility Commission, with an official address of 400 North Street, Keystone Building, Harrisburg, Pennsylvania, 17120.

40. Respondent, Office of the Attorney General of Pennsylvania, is the law enforcement branch of the Commonwealth of Pennsylvania, with an address of 16th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

41. Respondent, Linda L. Kelly, in her official capacity, is the Attorney General of the Commonwealth of Pennsylvania, with an official address of 16th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

42. Respondent, Department of Environmental Protection, is an agency of the Commonwealth of Pennsylvania, with an address of 400 Market Street, Harrisburg, Pennsylvania 17101.

43. Respondent, Michael L. Krancer, in his official capacity, is the Secretary of the Department of Environmental Protection, with an official address of 400 Market Street, Harrisburg, Pennsylvania, 17120.

LEGAL STANDING OF THE PETITIONERS

44. The equitable jurisdiction of the Commonwealth Court allows parties to raise pre-enforcement challenges to the substantive validity of laws when the parties would otherwise be forced to either submit to the regulations and incur the cost and burden that the regulations would inevitably impose or simply defend themselves against sanctions for non-compliance with the law. *Commonwealth of Pennsylvania v. Locust Township*, 600 Pa. 533, 548, 968 A.2d 1263, 1272 (2009) citing *Arsenal Coal Co. v. Dept. of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333, 1338 (1984).

45. Municipalities have legal standing to contest laws that have a direct, immediate and substantial impact on the interests, functions, powers and obligations of the municipal government. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 564, 838 A.2d 566, 580 (2003).

46. Individuals vested with legislative powers have legal standing to contest procedural infringements upon their legislative duties and functions. *Zemprelli v. Daniels*, 496 Pa. 247, 252 436 A.2d 1165, 1167-68 (1981); *Ritter v. Commonwealth*, 120 Pa. Commw. Ct. 374, 548 A.2d 1317 (1988), *aff'd Ritter v. Commonwealth*, 521 Pa. 536, 557 A.2d 1064 (1989) (per curiam).

47. Act 13 imposes substantial, direct, immediate and affirmative obligations upon the Municipal Petitioners to repeal, modify and amend existing zoning ordinances that regulate oil and gas development or Petitioners will be subject to sanction. Act 13 mandates that Petitioners:

- (1) Shall allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with all applicable Federal and State laws and regulations relating to the storage and use of explosives throughout every local government. Act 13, § 3304(b)(1);
- (2) May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than

conditions, requirements or limitations imposed on construction activities for other industrial uses within the geographic boundaries of the local government. Act 13, § 3304(b)(2);

(3) *May not impose conditions*, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are *more stringent* than the *conditions*, requirements or limitations *imposed on* other industrial uses or *other land development within the particular zoning district* where the oil and gas operations are situated within the local government. Act 13, § 3304(b)(3) (emphasis added);

(4) Shall have a review period for *permitted uses by right that does not exceed 30 days* for complete submissions or that *does not exceed 120 days for conditional uses*. Act 13, § 3304(b)(4) (emphasis added);

(5) Shall *authorize oil and gas operations*, other than activities at impoundment areas, compressor stations and processing plants, as a *permitted use by right* in all zoning districts. Act 13, § 3304(b)(5) (emphasis added);

(5.1) Notwithstanding section 3215 (relating to well location restrictions), may prohibit, or *permit* only as a *conditional use, wells or well sites* otherwise permitted under paragraph (5) within a *residential district* if the well site cannot be placed so that the *wellhead* is at least *500 feet* from any existing building. In a residential district, all of the following apply:

(i) A well site may not be located so that the outer edge of the *well pad* is closer than *300* feet from an existing building.

(ii) Except as set forth in paragraph (5) and this paragraph, oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.

Act 13, § 3304(b)(5.1) (emphasis added)

(6) Shall authorize *impoundment areas* used for oil and gas operations as a *permitted use by right in all zoning districts*, provided that the edge of any impoundment area shall not be located closer than 300 feet from an existing building. Act 13, § 3304(b)(6) (emphasis added);

(7) Shall authorize *natural gas compressor stations* as a *permitted use by right* in agricultural and industrial zoning districts and as a *conditional use in all other zoning districts*, if the natural gas

compressor building meets the following standards:

- (i) is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; and
- (ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

Act 13, § 3304(b)(7) (emphasis added);

- (8) Shall authorize a ***natural gas processing plant*** as a ***permitted use by right*** in an industrial zoning district and as conditional uses in agricultural zoning districts if all of the following apply:

- (i) The natural gas processing plant building is located at the greater of at least 750 feet from the nearest existing building or at least 200 feet from the nearest lot line unless waived by the owner of the building or adjoining lot.
- (ii) The noise level of the natural gas processing plant building does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by Federal law, whichever is less.

Act 13, § 3304(b)(8) (emphasis added);

- (9) Shall impose restrictions on vehicular access routes for overweight vehicles only as authorized under 75 Pa. C.S. (relating to vehicles) or the MPC.

Act 13, § 3304(b)(9);

- (10) ***May not impose limits*** or conditions on subterranean operations or hours of operation of compressor stations and processing plants or ***hours of operation*** for the drilling of oil and gas wells or the assembly and disassembly of drilling rigs.

Act 13, § 3304(b)(10) (emphasis added); and

- (11) ***May not increase setback distances*** set forth in Chapter 32 (relating to development) or this chapter. A local ordinance may impose setback distances that are not regulated by or set forth in Chapter 32 or this chapter if the setbacks are no more stringent than those for other industrial uses within the geographic boundaries of the local government.

Act 13, § 3304(b)(11) (emphasis added).

48. In addition, Municipal Petitioners must bring all zoning ordinances into conformity with Act 13 *within 120 days* of the effective date of Act 13. See Act 13, at § 3309(b)(4). If Municipal Petitioners do not meet this deadline, they are subject to challenge by a

private party in front of the Pennsylvania Public Utilities Commission or this Court, which could result in Petitioners losing access to *any* funds collected under the impact fee until Petitioners are able to revise their ordinances. Act 13, at § 3308. Municipal Petitioners also face the threat of paying a plaintiff's attorney fees and costs in a court challenge, which poses a significant hindrance to municipalities already facing revenue difficulties. Act 13, at § 3307.

49. Act 13 imposes new, mandatory duties upon Municipal Petitioners that are radically different than and a complete departure from existing obligations imposed on the Municipal Petitioners by the MPC. For example, to implement the mandates of Act 13, Municipal Petitioners must completely re-write their comprehensive plans and zoning codes, including the existing zoning laws that are consistent with established municipal comprehensive plans.

50. Such action is required because these enactments must be consistent with one another and must be based on the protection of the health, safety, morals, general welfare and orderly development of the community. 53 P.S. §§ 10603(j); 10605. Act 13 provides Municipal Petitioners *120 days* to expend significant time, monies and resources to:

- a. develop entirely new comprehensive plans and ordinances;
- b. consult with their respective planning commissions and county planning commissions;
- c. submit formal copies of proposed ordinances to municipal and county planning commissions;
- d. submit the proposed ordinance to the Public Utility Commission for its review and direction;
- e. advertise public notice of public hearings;
- f. conduct public hearings;

- g. submit revised formal copies of proposed ordinances to the appropriate planning commissions if public hearings resulted in any substantial changes to the proposal; and
- h. publicly advertise for passage of the instruments and approve final ordinances and comprehensive plans.

51. Petitioners have legal standing to prosecute this action because Act 13 imposes a radically new set of unconstitutional mandates on Municipal Petitioners that must be accomplished in a very limited period of time, and Municipal Petitioners' failure to comply subjects them to sanctions. *Zemprelli v. Daniels*, 496 Pa. 247, 252 436 A.2d 1165, 1167-68 (1981); *Arsenal Coal Co. v. Dept. of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333, 1338 (1984); *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 564, 838 A.2d 566, 580 (2003); and *Commonwealth of Pennsylvania v. Locust Township*, 600 Pa. 533, 548, 968 A.2d 1263, 1272 (2009).

FACTUAL AND PROCEDURAL BACKGROUND

A. Basis for Zoning Authority

52. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals' ability to acquire, possess and protect property and to use that property as the individual sees fit. *See*, PA. CONST. Art. I, Sec 1; *see also*, *Appeal of Girsh*, 437 Pa. 237, 241, 263 A.2d 395, 397, n. 3 (1970).

53. Individuals' constitutional rights to use their property as they see fit have traditionally been limited by the police power of the state, which is the exercise of the sovereign right of the government to take actions to protect the lives, health, morals, comfort and general welfare of the populace. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S. Ct.

2716, 2721 (1978) (rehearing denied); *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 131, 838 A.2d 718, 728 (2003).

54. The sovereign's exercise of the police power to limit individuals' behavior is designed to **protect** citizens by ensuring that an individual's use of his or her real property will not cause harm to neighbors or infringe upon the neighbors' property rights and interests. *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982). The exercise of the police power over individuals' rights to use their real property as they choose is manifested through a legislative body's power to establish zoning districts. *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958).

55. Implementation of constitutionally valid zoning restrictions is based upon the recognition that some uses of land are incompatible with other uses of land. ***Zoning allows a sovereign to designate distinct areas of a community where only certain, compatible uses of land are allowed, thereby protecting landowners because all property in a particular district is subject to the same restrictions.*** *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926) ("A nuisance may be merely a right thing in the wrong place."); *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 528 Pa. 12, 595 A.2d 6 (1991) (reargument granted and reversed on other grounds 535 Pa. 370, 635 A.2d 612).

B. Limits of Zoning Authority

56. The sovereign's power and authority to zone is not unlimited. Exercise of the police power to regulate the use of real property through the enactment of zoning ordinances ***is only constitutional when it promotes the public health, safety, morality and general welfare interests of the community and the regulations are substantially related to the purpose the ordinance purports to serve.*** *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 101 S.Ct. 2176, 2182

(1981); *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 419 Pa. 504, 215 A.2d 597, 607 (1966); *Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 507 Pa. 481, 489, 491 A.2d 86, 90 (1985). When enacting zoning regulations, all public authorities, ***including the Pennsylvania General Assembly***, must exercise this police power in furtherance of the public health, safety, morals and general welfare of the particular community. See, *Exton Quarries, Inc. v. Zoning Board of Adjustment of West Whiteland Township*, 425 Pa. 43, 66, 228 A.2d 169, 182 (1967) (concurring opinion of Chief Justice Bell) (emphasis added).

57. Also, establishment of zoning districts, and the associated restriction of certain uses in particular zones, must be done in conformance with a comprehensive plan for community growth and development so that the classifications will allow the community to develop in an orderly manner while observing the public interest of the community as a whole. *Swade v. Zoning Board of Adjustment of Springfield Twp.*, 140 A.2d 597, 598, (Pa. 1958); *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958); *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003).

58. The police power to zone cannot be exercised in an unreasonable or arbitrary manner and must be based upon the unique facts and circumstances present in each community. In *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 387 (1926), the United States Supreme Court recognized that universal, or statewide zoning is impractical and constitutionally impermissible, “[a] regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” See also, *Eller v. Bd. of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964) (emphasis added).

59. Moreover, a private party's desire to use land in a certain manner does not rise to the level of public welfare to establish a valid basis for the exercise of the police power to zone. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 530-31; 215 A.2d 597, 611 (1966).

60. When enacting and modifying zoning regulations, a sovereign is ***not permitted*** to ***confine*** its vision to just ***one isolated place or problem*** within the community, while disregarding a ***community-wide perspective*** and evaluation of the ***nature of compatible uses*** in zones. *Twp. of Plymouth v. County of Montgomery*, 109 Pa. Commw. Ct. 200, 531 A.2d 49, 57 (1987) (emphasis added). The Pennsylvania Supreme Court has unequivocally held that differential zoning of particular parcels or uses, without a reasonable basis for the differentiation in a zoning district that is not compatible with that use, commonly known as "spot zoning," is an unconstitutional abuse of the police powers entrusted in the sovereign. *In re Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 133, 838 A.2d 718, 729 (2003).

C. Role and Requirements of the Municipalities Planning Code

61. The Commonwealth of Pennsylvania, through enactment of the Municipalities Planning Code ("MPC"), vested local government with the police power to establish zoning districts, and did so in recognition of the fact that to be constitutional, zoning must reflect the uniqueness of each community. *See*, 53 P.S. 10101 *et seq.* The MPC is the Legislature's mandate for the unified regulation of land use and development. *Gary D. Reihart, Inc. v. Carroll Township*, 487 Pa. 461, 466, 409 A.2d 1167, 1170 (1979).

62. The MPC authorizes municipalities to enact local zoning regulations "in recognition of the ***unique expertise*** of municipal governing bodies to designate where ***different uses should be permitted*** in a manner that accounts for the community's ***development objectives***, its ***character***, and the suitabilities and ***special nature*** of particular parts of the community."

Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont, 600 Pa. 207, 225, 964 A.2d 855, 866 (2009) (internal quotations omitted) (emphasis added).

63. In recognition of the constitutional limits of the sovereign's authority to exercise the police power, the MPC prescribes a detailed framework related to the enactment of zoning regulations, including, *inter alia*:

- a. Zoning ordinances should reflect the policy goals of the statement of community development objectives . . . and ***give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality***. 53 P.S. § 10603(a) (emphasis added);
- b. The provisions of zoning ordinances shall be designed to ***promote, protect and facilitate*** any or all of the following: the ***public health, safety***, morals, and the ***general welfare; coordinated and practical community development*** and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, ***the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use***, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains. 53 P.S. § 10604(1) (emphasis added);
- c. The provisions of zoning ordinances shall be ***designed to prevent*** . . . overcrowding of land, blight, danger and congestion in travel and transportation, ***loss of health, life or property from fire***, flood, panic or ***other dangers***. 53 P.S. § 10604(2) (emphasis added);
- d. The provisions of zoning ordinances shall be ***designed to accommodate reasonable overall community growth***, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses. 53 P.S. § 10604(5) (emphasis added); and
- e. In any municipality . . . which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that ***different provisions may be applied to different classes of situations, uses and structures*** and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. ***Where zoning districts are created, all provisions shall be***

uniform for each class of uses or structures, within each district. . . 53
P.S. § 10605 (emphasis added).

64. Because the zoning power may only be exercised to promote the health, safety, morals and welfare of the community and to protect individuals from the harmful effects of neighbors' incompatible property uses, Zoning Districts are only found to pass constitutional scrutiny if each district only allows uses of land that are of the same character and are compatible with one another. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926); *Hopewell Township Board of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982).

65. Municipal Petitioners have established multiple zoning districts within their municipal boundaries, such as residential, commercial and industrial districts, based upon a review of numerous factors, including density of populations, compatibility of uses, topography, road access and existing development patterns. Within each zoning district, Municipal Petitioners have provided for certain, limited types of use, to ensure that development of land within each district was of the same general character, in order to protect the health, safety morals and welfare of the community. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

66. As a necessary component to establishing Zoning Districts, Municipal Petitioners have also classified land uses in each particular district according to the intensity of the use. Permitted uses by right of land are absolutely and unconditionally allowed in a zoning district. *Aldridge v. Jackson Twp.*, 983 A.2d 247 (Pa. Commw. Ct. 2009). Conditional Uses of land are allowed in a district, though with greater scrutiny, as they are analyzed on a case-by-case basis. *Ligo v. Slippery Rock Township*, 936 A.2d 1236, 1242 (Pa. Commw. Ct. 2007). To obtain Conditional Use approval, a party must file an application with the governing body, demonstrate that the use satisfies enumerated standards set forth in the zoning ordinance and a public hearing

is held for potentially affected landowners to learn about or to raise concerns or objections regarding the proposal. 53 P.S. § 10913.2. Finally, like a Conditional Use, a Special Exception in a zoning ordinance describes a use that is allowed in a particular zoning district, subject to the explicit standards and criteria in the zoning ordinance and case-by-case review by the municipality's Zoning Hearing Board. *Kotzin v. Plymouth Township Zoning Bd. of Adjustment*, 395 Pa. 125, 127, 149 A.2d 116, 117 (1959); *Broussard v. Zoning Bd. of Adjustment of City of Pittsburgh*, 907 A.2d 494 (Pa. 2006). 53 P.S. § 10912.1.

67. As a matter of example, Petitioner, Cecil Township, a growing Township of about 11,000 residents has established a series of general residential zoning districts within its corporate limits, divided by the varying intensities of residential development allowed in each zone. In the R-2 Medium Density Residential Zoning District, Permitted Uses by Right are farms, single-family dwellings, two-family dwellings, multi-family dwellings, planned residential developments, customary accessory uses such as satellite dishes and garages, home offices and essential services. *See*, Cecil Township Unified Development Ordinance, Ordinance 5-00, at Part 9, §903(A), attached hereto as Exhibit 1. Houses of Worship and Daycare Centers are Conditional Uses in the Cecil township R-2 Medium Density Residential Zoning District, which means that although the use may be authorized, they may only be constructed upon demonstration to the Cecil Township Board of Supervisors that the development plans satisfy ordinance standards following a duly advertised Public Hearing allowing for comments or objections from the general public, including potentially affected landowners. *See*, Exhibit 1 at Section 903 (B).

68. Pursuant to Act 13, Cecil Township's R-2 Medium Density Zoning District will also allow for natural gas drill sites and several million gallon hazardous wastewater impoundments as Permitted Uses by Right. The result is that the approval of construction of a

church or daycare center in the R-2 Zoning District will require greater local scrutiny and oversight than the approval of construction of heavy industrial uses of natural gas drill sites and hazardous wastewater impoundments; the latter will be not be subject to any local scrutiny at all.

D. Pennsylvania Oil and Gas Drilling Activities

69. Natural gas drill sites develop in different stages and are on average several acres in size. Initially, a road is constructed, a pad is cleared and vertical drilling can begin. This activity is noisy, dusty and will take several months to complete. *See*, Photographs of Drill Pad, attached hereto as Exhibit 2. The second phase will result in twenty-four (24) hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site. *See*, Diesel Engines at Drill Site, attached hereto as Exhibit 3. The horizontal drilling is very rigorous and will take months to complete or longer depending upon how many wells are initiated. Once completed, there will be hazardous chemicals brought to the site, and mixed and utilized to fracture the shale. This “frac fluid” flows back to the surface which is then utilized or disposed of in various ways. This process takes several weeks and is extremely noisy. It results in hundreds of heavy tanker-trucks going to and from the site twenty-four (24) hours a day. *See*, Photographs of Truck Traffic, attached hereto as Exhibit 4. Once all the wells have been fractured and casing is completed, flaring typically will occur which will result in an open flame for up to several weeks in duration. *See*, Photographs of Flaring, attached hereto as Exhibit 5. Soon thereafter the wells may be completed.

70. The wells will be serviced and the final pad may have a number of features more than one (1) acre in size. These features include wellheads, condensate tanks, vapor destruction units with open flames, pipelines, and metering stations. All of these items require ongoing truck traffic and maintenance for the life of the site. *See*, Completed Site Photographs, attached hereto

as Exhibit 6, (demonstrating these features of a site with two (2) wells in Robinson Township, Pennsylvania, that is currently being remediated because of a leak).

71. As some municipalities have several different layers of shale, i.e., the Marcellus, Utica, and Upper Devonian, this process will be repeated several times, tripling the industrial activities. Moreover, companies may decide to return to rework existing wells or to drill more on the pad. This ongoing activity shows the massive industrial activity which is now brought into all communities by Act 13.

72. Petitioner, Mount Pleasant Township, already has 108 Marcellus wells drilled with 97 of those wells being active. It is home to two (2) compressor stations, one (1) dew point control facility, four (4) impoundments and miles of pipelines. In the future, an additional eight (8) well pads are planned. As a result of these oil and gas activities, the Township has experienced an overturned tanker, an explosion, spills, chemical leaks and fires, specifically including 7 (seven) fires at well sites. *See*, Photographs of Fire and Explosion at Compressor Station, attached hereto as Exhibit 7. Furthermore, Mount Pleasant Township has had to close two (2) roads that became impassable in residential areas due to heavy truck traffic. Eleven (11) tractor trailer accident reports were received for the period of 2010 to 2011. Upon realization of this onslaught of industrial activity, citizens' complaints received by the Township were at an all time high.

73. Similarly, wastewater impoundments, which are not necessary to gas drilling operations but may be preferred by some companies, contain hazardous waste exempted from the designation by name only (*See*, Safe Drinking Water Act, at § 322), could be used for a decade or longer and requiring twenty-four (24) hour a day truck traffic and operations. *See*, Photographs of Wastewater Impoundments, attached hereto as Exhibit 8. These "impoundments" retain millions of gallons of fluids that include a cocktail of chemicals, some of which are

carcinogenic. These sites will additionally use trucks and pipelines to move this hazardous material unfettered through all communities. As a point of contrast, Cecil Township's ordinance provides for chemical storage facilities as a Special Exception in the I-2 Heavy Industrial District, i.e. subject to the greatest scrutiny in the most use-intensive district. *See*, Exhibit 1 at §912(D). As noted *supra*, the Commonwealth has determined by virtue of Act 13 that these uses are akin to residential housing and are more in keeping with the character and nature of permitted uses by right in residential areas than other installations, like churches and daycare centers which require municipal oversight and approval.

74. For decades, Municipal Petitioners and other municipalities have used their aforementioned zoning powers to further their respective community objectives, and to provide for orderly development. Municipal Petitioners have also allowed for the production of natural resources, including oil and gas development, while simultaneously protecting the health, safety, morals and general welfare of the community. Traditionally, the Commonwealth's interest in oil and gas development has been centered on the efficient production and utilization of the natural resources in the Commonwealth, while in contrast, municipalities' interests have been focused on the orderly development and use of land in a manner consistent with local demographic and environmental concerns. *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 225, 964 A.2d 855, 865 (2009).

75. Despite the Pennsylvania Supreme Court's recognition of municipalities' unique expertise to enact zoning regulations tailored to individual community development objectives and character as well as the years of expansion of oil and gas development under the oversight of municipal zoning ordinances consistent with the United States Constitution and the Pennsylvania Constitution, the Pennsylvania General Assembly, through Act 13, has expressly preempted and

superseded all municipal zoning ordinances related to the location of oil and gas development activities. *See, Huntley & Huntley, Inc.*

76. Pennsylvania has 2,563 municipalities, ranging from the densely populated cities of Philadelphia and Pittsburgh to mountainous, rural communities, such as Elk Lick Township, Somerset County, location of Mount Davis, the highest point in the Commonwealth. Despite each municipality's unique geography, topography, wind conditions, population density, existing land use practices, community development objectives and comprehensive plans, Section 3304 of Act 13 creates one set of zoning standards governing oil and gas development. This one-size-fits-all scheme applies uniformly to every zoning district in every municipality in the entire Commonwealth. *See, Act 13, § 3304; supra* at ¶ 25. As such, Act 13 violates the U.S. Constitution and Pennsylvania Constitution.

ARGUMENT

COUNT I – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- I. Petitioners seek a declaration that through Act 13 the Pennsylvania General Assembly has engaged in unconstitutional statewide zoning, by way of an improper use of its police powers and by enacting zoning regulations without consideration of zoning districts, comprehensive plans or how the zoning enactments would serve to protect the health, safety, morals or welfare of local communities in violation of Article I, Section 1 of the Pennsylvania Constitution and Section 1 of the 14th amendment of the United States Constitution.**

77. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

78. The Commonwealth created local government entities to manage municipalities at a local level, recognizing that local officials will have a better understanding of the distinct characteristics and needs of the locality they govern. Municipal governments have been entrusted by the Commonwealth with zoning powers. "Municipal corporations are agents of the state,

invested with certain subordinate governmental functions for reasons of convenience and public policy.” *Commonwealth v. Moir*, 49 A. 351, 351 (Pa. 1901). Pennsylvania courts have consistently held that land use and zoning responsibilities are shared by municipal governments. *See, Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975)

79. It is manifest that “[i]n promulgating a zoning ordinance, ordinance legislators are to provide for uniform uses in respect to zoning districts pursuant to Section 605 of the Municipalities Planning Code.” *Ludwig v. Zoning Hearing Bd. of Earl Twp.*, 658 A.2d 836, 838 (Pa. Commw. Ct. 1995) (emphasis added). The “very essence of zoning is the designation of certain areas for different use purposes.” *Swade v. Zoning Bd. of Adjustment of Springfield Twp.*, 140 A.2d 597, 598 (Pa. 1958).

80. Section 605 of the Municipalities Planning Code (“MPC”) explicitly states, “...The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district ...” 53 P.S. § 10605 (emphasis added).

81. The Pennsylvania Supreme Court has defined zoning as “the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan.” *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 609 (Pa. 1958). Consequently, municipal officials have been required to zone in a manner that is consistent with its police power, zoning districts and the comprehensive plan for the community.

82. Zoning districts may be constitutionally created when they are part of a comprehensive plan designed to serve the public benefit. Such an aim is accomplished by

allowing different intents and uses by right in varied districts and ultimately keeping compatible uses grouped together in a designated area. Each use classified within a zoning district is subject to assorted levels of scrutiny and approval processes based on its conformity and compatibility with other designated uses in the zone.

83. In the case of Act 13, the Pennsylvania General Assembly itself has engaged in statewide zoning, creating a “one-size-fits-all” standard for local zoning ordinances regarding the industrial activity of the oil and gas drilling industry, usurping municipalities ability to undertake its statutory and constitutional obligation to provide compatible uses in its zoning districts, protect key resources and districts in its community and to act in the best interests of its residents. *See*, 53 P.S. § 10604.

84. Under the Act, each municipality is required to allow the industrial activity of “oil and gas operations,” except for natural gas processing plants and compressor stations, as a permitted use by right in all zoning districts. *See*, Act 13, at § 3304(b)(5); *see also*, Photographs of Drill Sites, attached hereto as Exhibit 9. “Oil and gas operations” is broadly defined and includes activities such as location assessment, seismic testing², drilling, fracturing, and pipeline operations. *See*, Act 13, at § 3301.

85. In addition, municipalities are required to allow impoundments for drilling wastewater in all zoning districts, including residential districts, as long as they are not closer than three-hundred (300) feet from an existing building. *See*, Act 13, at § 3304(b)(6); *see also*, Photographs of Impoundments, attached hereto as Exhibit 10.

² Pursuant to Act 13, seismic testing is a permitted use throughout a municipality despite the fact that some or all of Petitioners’ municipalities have been undermined by coal operations years ago. Some residents have as little as twenty (20) to thirty (30) feet of cover over an abandoned mine. Likewise, when thumper trucks are used on roadways, some residents’ foundations only a matter of feet away may be impacted. Yet, local officials who are aware of these unique potential problems cannot protect their citizens as it must permit the activities without further conditions or oversight.

86. Natural gas compressor stations **must** be a permitted use by right in agricultural and industrial zoning districts regardless of the designation of light or heavy industrial, and a conditional use in all other districts, as long as they are not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line. *See*, Act 13, at § 3304(b)(7); *see also*, Compressor Station Photograph, attached hereto as Exhibit 11.

87. Natural gas processing plants must be a permitted use by right in all industrial zoning districts and a conditional use in agricultural zoning districts, as long as they are not closer than seven-hundred fifty (750) feet from an existing building and two-hundred (200) feet from any property line. *See*, Act 13, at § 3304(b)(8); *see also*, Processing Plant Photograph, attached hereto as Exhibit 12.

88. The terms of Act 13 now include impoundments or “frac-water ponds” and drill sites in the mix of **permitted** uses by right in residential districts. Conceivably, as long as the minimum setback requirement of three-hundred (300) feet has been met or waived, an oil and gas driller could place a centralized impoundment in the middle of a residential neighborhood or beside an elementary school. *See*, Act 13, at § 3304.

89. Act 13 essentially zones each municipality in the Commonwealth in an identical manner allowing for industrial uses in non-industrial areas. Separate zoning districts providing for orderly development can no longer be effective. Further, existing zoning districts risk constitutional challenge because incompatible land uses are being introduced into otherwise homogenous zoning districts.

90. The Pennsylvania Supreme Court has explicitly recognized the rights of landowners in this regard as embodied in Article I, Section 1 of the Pennsylvania Constitution, “[t]he right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental influence except as **necessary** to protect the interests of the public **and of**

neighboring property owners, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003) (emphasis added).

91. Despite this basic premise, selected infringements on a person’s constitutionally protected property rights will be permitted and deemed constitutional under certain circumstances. “Property owners have a constitutionally protected right to enjoy their property ... That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, i.e., governmental action taken to protect or preserve the public health, safety, morality and welfare.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003).

92. Therefore, it is well-settled law that zoning regulations may constitutionally limit otherwise unalienable property rights only when enacted pursuant to the police power and for the health, safety, morality and welfare of local communities. “Where there is a particular public health, safety, morality or welfare interest in a community, the municipality may utilize zoning measures that are substantially related to the protection and preservation of such an interest ...(zoning ordinances should reflect the needs of citizens and **the suitability and specific nature of particular parts of the municipality**).” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003) (citing *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143, 150 (2002) (emphasis added) (internal citations omitted). “[Z]oning acts and ordinances are valid and constitutional as structural or general legislation whenever they are necessary for the preservation of public health, safety, morals or general welfare.” *Appeal of Lord*, 81 A.2d 533, 535 (Pa. 1951).

93. Regardless of whether a zoning regulation comes in the form of a municipal ordinance or a state statute, this burden does not change – it must be substantially related to the

public health, safety, morals or general welfare. *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 611 (Pa. 1958).

94. Pursuant to Article I, Section 25 of the Pennsylvania Constitution, not even the Pennsylvania General Assembly has the authority to transgress the rights set forth in Article I. Furthermore, "...property owners have certain rights which are ordained, protected and preserved in our Constitution and which neither zeal nor worthwhile objectives can impinge upon or abolish." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 728 (Pa. 2003) (citing *Cleaver v. Bd. of Adjustment*, 200 A.2d 408, 413 n. 4 (Pa. 1964)).

95. When engaged in zoning, the Commonwealth must follow the same Constitutional mandate imposed upon municipalities when enacting zoning ordinances. Any limitations on what a landowner can do with their property, whether flowing from the state or local level, must be imposed directly for the benefit of the health, safety, morality or welfare of the surrounding community. **"[T]he test of constitutionality of a zoning ordinance is whether the health, safety, morals or general welfare of the inhabitants of the part of the community affected will be promoted by the application of the ordinances."** *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 610 (Pa. 1958) (emphasis added).

96. The Commonwealth's zoning regulations enacted pursuant to Act 13 allowing for drilling and impoundments as permitted uses by right in all zoning districts are unconstitutional under Article I, Section 1 of the Pennsylvania Constitution as an arbitrary act, and an unnecessary and unreasonable interference with property rights when enacted in violation of the Commonwealth's police power. Prior to enacting these zoning provisions, the Commonwealth failed to undertake **any** localized analysis attempting to comply with any municipal or state comprehensive plans, acknowledge or respect zoning districts, or adhere to the compulsory

constitutional considerations explained above when enacting legislation pursuant to its police power.

97. Because the Constitution protects property rights, the Commonwealth is empowered to infringe upon those rights through zoning powers only when such zoning will benefit the individual community. The Commonwealth **must** undertake an analysis to determine how the zoning regulation will benefit the local community's health, safety, morals or general welfare before any zoning regulation may be justified as an enactment pursuant to the Commonwealth's police power. This Constitutional "zoning standard" applies to all levels of government alike; the Commonwealth is likewise limited by constitutional restraints. *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.*, 228 A.2d 169, 182 (Pa. 1967) (concurring opinion).

98. In order for zoning to be "lawful" and constitutional under Article I, Section 1, it "must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits. These considerations have been summarized as requiring that **zoning be in conformance with a comprehensive plan** for growth and development of the community." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003). Zoning is not a mechanical exercise that can be accomplished without a diligent inquiry into the land and community to be zoned.

99. Because Act 13 has zoned the industrial activity of oil and gas operations in the same manner across the entire Commonwealth, it was entirely impossible for the legislature to undertake a truthful and meaningful analysis of how these activities would affect the health, safety and welfare each individual community in the Commonwealth. Clearly, what benefits a rural community on the Western side of the Commonwealth may be detrimental to an urban community on the Eastern side of the Commonwealth. "A regulatory zoning ordinance, which

would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Municipalities across Pennsylvania vary greatly in many respects, including topography, wind conditions, population density, and infrastructure. Yet, through Act 13, the Commonwealth has failed to account for or undertake any analysis regarding these drastic distinctions between various Commonwealth communities, essentially removing separate zoning districts that have been created at the direction of the same legislature pursuant to the MPC in violation of its police power.

100. There is no substantial relationship between: 1) the provisions of the Act that authorize industrial activity in residential and commercial zoning districts as permitted uses by right; and 2) each community’s comprehensive plan for orderly development. To the contrary, examination of the considerations used by the General Assembly to promote the legislation weigh in favor of the **oil and gas industry itself** rather than those property owners and citizens whose rights are constitutionally guaranteed and protected. The Pennsylvania legislature set out to create predictability and ease for the oil and gas industry as it navigates its business endeavors within the borders of local municipalities. Beyond its attempt to protect one particular industry, the legislature failed to otherwise demonstrate that the Act is a necessary tool to preserve public health, safety, morals or general welfare of Pennsylvania citizens. *Appeal of Lord*, 81 A.2d 533, 537 (Pa. 1951) (stating that property regulations must be “clearly necessary”). By contrast, the state of Texas also has been successfully experiencing shale drilling for years, yet local zoning remains in place demonstrating the lack of necessity for Act 13 and the obvious desire of the Pennsylvania legislature to demonstrate favorable treatment in Pennsylvania.

101. Act 13 thrusts upon municipalities the mandate that industrial uses be allowed in residential, agricultural, resource protection and commercial zones, frustrating the constitutional

rationale for the creation of separate zones. “The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and of contagion are often lessened by the exclusion of [industrial activities] from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926).

102. Furthermore, any investigation into the individualized benefit of the law must encompass an accurate examination of the potential negative effects that inevitably come with introducing an industrial activity into varied residential, agricultural and commercial areas. Scientific evidence has shown that noise, odors, heavy truck traffic, open flames, workers living on-site, and potential harmful emissions may flow from those industrial sites into residential neighborhoods. Moreover, Washington County residential homeowners have requested and received reductions in the real estate tax assessment values of these homes when industrial applications associated with the oil and gas industry have moved within proximity. This will result in the future strain for a municipalities’ duty to maintain property values and a valid tax base.

103. In doing an evaluation on the effects of the health, safety, and general welfare of local communities while zoning, the Commonwealth failed to consider the following localized concerns associated with oil and gas operations, including:

a. **Condensate Tanks** (Pursuant to Act 13, tank batteries can be placed 300 feet from residential uses.)

i. Condensates are hydrocarbons in a semi-liquid state that are produced along with the natural gas at the well. Condensates are also composed of aromatic hydrocarbons such as benzene, toluene, xylene and ethyl-

benzene ("BTEX"). *See*, Sources of Oil and Gas Air Pollution, attached hereto as Exhibit 13.

- ii. The vapors of benzene, toluene and xylene are heavier than air and will accumulate in low lying areas. *Id.*
- iii. Toluene affects the reproductive and central nervous system. *See*, IARC Monograph of Toluene, attached hereto as Exhibit 14; *see also*, New York Dept. of Environmental Conservation, Division of Mineral Resources, Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, attached hereto as Exhibit 15.
- iv. Ethyl-benzene and xylene can have respiratory and neurological effects. *See*, IARC Monograph of Ethyl-Benzene, attached hereto as Exhibit 16; *see also*, IARC Monograph of Xylene, attached hereto as Exhibit 17; *see also*, TEDX, Health Effects Summary Statement, January 5, 2011, attached hereto as Exhibit 18.
- v. Children are particularly susceptible to chemical exposures and chemical exposures can cause severe, and in many cases irreversible, health effects. *See*, World Health Organization, Environmental Health Criteria 237, Principles for Evaluating Health Risks in Children Associated with Exposure to Chemicals, attached hereto as Exhibit 19; *see also*, American Academy of Pediatrics, Ambient Air Pollution: Health Hazards to Children, 2004, attached hereto as Exhibit 20.

b. Glycol Dehydrates & Compressor Stations

- i. Compressor stations remove water from the gas and compress gas to move it along pipelines, transporting it from site to site.
- ii. Compressor stations release aromatic organic chemicals into the air and also release benzene, toluene along with other volatile organic compounds. *See*, Sources of Oil and Gas Air Pollution, attached hereto as Exhibit 13.
- iii. A compressor station operator appearing before the Zoning Hearing Board for Petitioner, Cecil Township, testified as follows:

Q: Are there VOCs [volatile organic compounds] at compressor sites?

A: Yes, there is.

Q: And do you know how many tons per year are emitted from a compressor site?

A: I can tell you what our final build out would be for this site with eight engines and a maximum load it would be 19-and-a-half tons of VOCs a year.

....

Q: Do you know how far those emissions travel?

A: It would depend on your topography and upon the meteorological conditions whether it's a windy day or not. And then you say how far they could travel, you know, you would be talking about a certain concentration that could be associated with that.

See, Cecil Township January 31, 2011 Zoning Hearing Board Transcript, attached hereto as Exhibit 21.

c. **Flaring** (Pursuant to Act 13, can take place on a well pad that is 300 feet from residential uses.)

- i. Flaring is the practice of burning gas that is deemed uneconomical to collect and sell. Flaring is also used to burn gases that would otherwise present a safety problem. *See, Final Project Reprint: Oil and Gas Emission Inventories in Western States, Western Governors' Association, attached hereto as Exhibit 22.*
- ii. Flaring creates air pollution and releases of benzene, formaldehyde, polycyclic aromatic hydrocarbons (PAHs, including haphthalene), acetaldehyde, acrolein, propylene, toluene, xylenes, ethyl-benzene and hexane, many of which are listed hazardous substances and cancer causing agents. *Id.*
- iii. Sulfur dioxide is emitted during flaring of natural gas. It is regulated by the EPA as a criteria air pollutant and can cause severe health effects including, lung damage, respiratory illness, heart conditions and premature death. *Id.*
- iv. In fact, sulfur dioxide, also a neurotoxin, is so pervasive in drilling activities, a study in Texas demonstrated exposure to it could cause such severe health effects, based upon air disbursement mobility, that setbacks are recommended at least one (1) mile from all schools. *See, Fort Worth League of Neighborhoods, Recommendation for Policy Changes for Gas Drilling Near Schools, February 2011, attached hereto as Exhibit 23.*

d. **Impoundments** (Pursuant to Act 13, can be built as close as 300 feet to residential uses.)

- i. Impoundments are earthen pits several acres in size that contain flowback or produced water which can contain more than seven-hundred (700) chemicals from the hydraulic fracturing process, including extremely toxic and cancer-causing agents.
- ii. Such cancer-causing agents include, but are not limited to, benzene, lead, toluene, ethyl-benzene, xylene, 2-butoxyethanol, methanol (a hazardous air pollutant), and diesel fuel. *See, U.S. House of Representatives*

Committee on Energy and Commerce Minority Staff Report on Chemicals used in Hydraulic Fracturing, April 2011, attached hereto as Exhibit 24.

- iii. Additionally, many more chemicals that end up in these impoundments are completely unknown as to their toxicity, ability to cause cancer in human beings or acute health problems, because the companies injecting these fluids containing chemicals do not have access to the proprietary information about the products themselves. *Id.*
- iv. Over thirty-two (32) million gallons of diesel fuel or products containing diesel fuel has been injected as hydraulic fracturing fluid in nineteen (19) states in the United States between 2005 and 2009, including Pennsylvania. This fluid ultimately ends up in these open impoundments. *See, Fracking Investigation Reveals Millions of Gallons of Diesel Fuel Injected into Ground across the United States, attached hereto as Exhibit 25.*
- v. In spite of the known toxicity of diesel fuel components, namely BTEX (benzene, toluene, ethyl-benzene and xylene), companies performing hydraulic fracturing using diesel fuel have done so without a permit under the Safe Drinking Water Act, in violation of federal law. *Id.*
- vi. Hydraulic fracturing fluids also contain petroleum distillates, which have been found to contain up to ninety-three (93) times more benzene. Benzene is known to cause acute myeloid leukemia (“AML”) within as short a period of time as five (5) years from the date of a person’s first exposure to it. *See, Drilling around the Law, Environmental Working Group, EPA attached hereto as Exhibit 26; see also, IARC Monograph on Benzene, attached hereto as Exhibit 27.*
- vii. Many of the lighter more volatile chemicals and compounds being held in the impoundments, such as benzene, toluene and hydrogen sulfide, will escape from the fracturing fluid in the impoundment into the air. These chemicals may then be transported through the air, into nearby neighborhoods. *See, Final Project Reprint: Oil and Gas Emission Inventories in Western States, Western Governors’ Association, attached hereto as Exhibit 22; see also, Chemical and Biological Risk Assessment for Natural Gas Extraction in New York, attached hereto as Exhibit 28.*
- viii. Other significant contaminants created at these impoundment sites include carbon monoxide, hydrogen sulfide, nitrogen oxides, ozone, particulate matter, sulfide dioxide and volatile organic compounds. *Id.* Because of the release of these pollutants, hydrogen sulfide in particular, impoundments are associated with strong noxious odors smelling similar to rotten-eggs.

- ix. As a result of various factors, including hydrogen sulfide problems at impoundments, some impoundment operators use aeration systems that serve to further mobilize VOC's into the surrounding community.
- x. The Pennsylvania DEP itself conducted an air quality study which found benzene in the air around an impoundment above acceptable levels. *See*, Southwestern Pennsylvania DEP Study, attached hereto as Exhibit 29.

e. **Resources on general health effects**

- i. EPA Pavillion, Wyoming Study, attached hereto as Exhibit 30.
- ii. Earth Justice letter to Lisa P. Jackson, Administrator, EPA, August 4, 2011, attached hereto as Exhibit 31.
- iii. Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources, Science of the Total Environment, attached hereto as Exhibit 32.

104. For Municipal Petitioners, such evidence should weigh heavily against allowing oil and gas operations as a permitted use by right in any district but industrial districts, including residential zoning districts, at times only a maximum of three-hundred (300) feet away from schools, playgrounds and homes.³

105. Additionally, other than the minimum setbacks written into the Act, the Commonwealth imposes no further restrictions on drilling activities – for example, there is no limitation to the number of impoundments or compressor stations that may be placed in any particular district; there is no limitation on the hours of operations of drill sites, impoundments and other facilities; and there is no limitation on the heavy truck traffic to and from these sites. *See*, Photographs of Multiple Impoundments and Compressor Stations, attached hereto as Exhibit 33. Impoundments can be typically expected to be in place for five (5) to ten (10) years or more. Moreover, as a permitted use by right, there is no forum or means for a municipality to minimize any negative consequences from surrounding uses.

³ The threat of explosions, fires, and spills of hazardous substances from oil and gas operations is well documented within the Commonwealth. *See, Commonwealth v. Fitzmartin*, 102 A.2d 893 (Pa. 1954).

106. As further evidence of the foregoing, the following is a sampling of recent headlines since Marcellus Shale drilling has entered the area:

- a. *DEP: Cabot Drilling Caused Methane in Lenox Water Wells*, January 9, 2012, The Times-Tribune, attached hereto as Exhibit 34.
- b. *Firm Continues Cleanup of Methanol Spill*, October 11, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 35.
- c. *Danger Above and Below: Man Dies on the Job at Gas Well Site*, July 31, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 36.
- d. *Marcellus Firm Fined for Failing to Report Spill*, June 28, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 37.
- e. *Trucking Danger: The Drilling Industry Must Improve its Vehicles*, June 23, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 38.
- f. *Pa. Report Links Gas Well Sites to Health Risks; Development Near Kids, Patients Cited*, May 6, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 39.
- g. *Bradford County Shale Well Spews Fluids*, April 21, 2011, Pittsburgh Post-Gazette, attached hereto as Exhibit 40.
- h. *Three Burned at Marcellus Shale Drilling Site near Avella*, February 24, 2011, Pittsburgh Tribune-Review, attached hereto as Exhibit 41; *See also*, Photograph of Fire at Avella Drill Site, attached hereto as Exhibit 42.
- i. *Marcellus gas flare may burn for days*, June 9, 2010, Pittsburgh Post-Gazette, attached hereto as Exhibit 43.

107. The Commonwealth was constitutionally required to consider all of these variables prior to enacting any zoning regulation in a localized context in violation of its police power that serve to infringe on the health, safety and welfare of its citizens. Rather, in the case of Act 13, not only did the Commonwealth fail to adhere to the constitutionally mandated standard in recognition of its police powers – it failed to apply any standard whatsoever. Despite entering into the realm of zoning, it plainly ignored the Constitutional oversight and scrutiny that accompanies zoning activities. It would be a near impossibility to undertake the required analysis on a statewide basis, which highlights the logic and rationale for entrusting local governments to engage in all other zoning activities that allow for a localized analysis of the health, safety, morals and general welfare of their communities and comport with the Constitutional requirements of zoning as set forth in the MPC. Through Act 13, however, the Commonwealth has effectively usurped this responsibility from local governments and handed it over to the oil

and gas industry and oil and gas owners, many of who may not even be residents of the Commonwealth.⁴ Through Act 13 the Commonwealth has zoned in a manner that fails to recognize community comprehensive plans, local community development objectives, varied zoning districts and consideration of the health, safety, welfare and morals of local communities. As a result, Act 13 is an improper use of the Commonwealth's police power and violates Article I, Section 1 of Pennsylvania Constitution and the 14th Amendment of the U.S. Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT II – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- II. **Petitioners seek a declaration that Act 13 allows for incompatible uses in like zoning districts in derogation of municipalities' comprehensive zoning plans and therefore constitutes an unconstitutional use of zoning districts.**

108. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

109. When zoning is constitutionally performed with the aim of benefitting the health, safety, morals or general welfare of a community, such a goal is routinely accomplished by placing compatible uses in like districts. *See, Village of Euclid v. Ambler Realty Co.*, 272 U.S.

⁴ The subsurface estate, including oil and gas, may be severed and owned separately and apart from the surface. As such, in many places within the Commonwealth oil and gas is owned by out-of-state individuals who have leased their oil and gas to out-of-state oil and gas companies. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893).

365 (1926). An example of this can be seen through any traditional residential district which allowed for only traditionally residential activities as permitted uses by right within the district. Local ordinances which grouped together residential uses and disallowed industrial uses as a permitted use by right by right, including oil and gas drilling, withstand constitutional scrutiny and were previously designated as a valid use of the sovereign's police power prior to the enactment of Act 13. *See, Huntley & Huntley v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

110. In order for zoning to be constitutional and valid, it must be “in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality.” *Atherton Development Company v. Township of Ferguson*, 29 A.3d 1197, 1204 (Pa. Commw. Ct. 2011) (quoting *Twp. of Plymouth v. Cnty. Of Montgomery*, 109 Pa. Commw. Ct. 200, 531 A.2d 49, 57 (1987)). Accordingly, lawful zoning “necessarily requires that the picture of the whole community be kept in mind while dividing it into **compatibly related zones** by ordinance enactments.” *Id.*

111. When incompatible uses are placed in zoning districts with uses that are otherwise in conformity with each other, the Pennsylvania Supreme Court has termed the results as “spot zoning” and consistently held such zoning efforts unconstitutional. Specifically, “spot zoning ... is an arbitrary exercise of police powers that is prohibited by our Constitution. ... [T]he most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003)(internal citations and quotations omitted). “[W]hen a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within the community, disregarding a community-wide perspective, that body is not engaged in lawful zoning....” *Atherton Development Company*, 29 A.3d at 1204 (citing *Twp. of Plymouth v. Cnty. of Montgomery*, 531 A.2d 49, 57 (1987)).

112. The logical and practical extent of Act 13 will have the same effect as “spot zoning” in that it inevitably allows uses entirely incompatible with existing uses that are similar and compatible throughout varied zoning districts in the Commonwealth. As such, Act 13’s unjustified and unsupported forced injection of the industrial uses of oil and gas and related operations into every single zoning district in the Commonwealth is analogous to unconstitutional “spot zoning” and therefore subject to the same rationale. Allowing oil and gas operations as a permitted use by right in residential zoning districts is a “differing zoning treatment . . . which cannot be justified with reference to any of the community-wide concerns that serve as the legitimate basis for zoning in conformance with a comprehensive plan.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 731n.7 (Pa. 2003).

113. The question becomes, “whether the lands at issue are a single, integrated unit and whether any difference in their zoning from that of adjoining properties can be justified with reference to the characteristics of the tract and its environs.” *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 730 (Pa. 2003). Neither the General Assembly nor the legislation itself offers any justification for permitting incompatible, non-uniform uses within local zoning districts. There is no explanation as to why each particular locality within the Commonwealth is well suited to handle the introduction of industrial oil and gas operations into each and every one of its already-classified zones as a permitted use by right which affords no local analysis or due process rights for its citizens regarding potential negative consequences. As horizontal drilling allows for operations to take place over a distance of one (1) mile, and as impoundments are not necessary or even used by many drilling companies, the need to place such uses in non-compatible districts with no local oversight that could serve to add protective conditions unique to the area and terrain or deny the use, makes zoning laws and rules for this industry the exception and not the rule.

114. Despite the well-settled rule of law, Act 13 has unlawfully created a non-uniform class by mandating industrial activities in residential and other non-industrial areas. In any other instance, allowing and storing hazardous waste in an otherwise residential area would amount to unconstitutional “spot zoning.” The U.S. Supreme Court has stated that, “...the exclusion of buildings devoted to business, trade, etc., from residential districts bears a rational relation to the health and safety of the community. Some grounds for this conclusion are promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry ... aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). The inclusion of industrial uses in residential areas would have precisely the opposite effect and no longer be related to the protection of health, safety and welfare of the community or be seen as a proper use of the Commonwealth’s police power.

115. By allowing for oil and gas activities as a permitted use by right, the legislation essentially places drilling on par with other uses that are permitted within any zoning district. The inevitable result, however, is quite significant. For instance, because the density of oil and gas activities is not restricted, a single family home in a district zoned as residential could potentially end up surrounded by impoundments holding frack or flow-back water and dangerous chemicals only three-hundred (300) feet away on all sides essentially resulting in a “taking” by a municipality. Prior to Act 13, a municipality could have controlled such a scenario to ensure that the uses are compatible with the particular zoning district. Act 13 wholly strips this ability from the municipalities and denies local governments the ability to fulfill its statutory obligation to protect the health, safety and welfare of its citizens.

116. Rather than creating uniform classes within each zoning district as required by Section 605 of the MPC and Article I, Section 1 of the Pennsylvania Constitution, Act 13 singles out the oil and gas industry for special treatment necessarily leads to the anomaly of oil and gas drilling as permitted in nearly all zoning districts whether the other uses are compatible or not. Whereas other industrial uses are confined to industrial districts with like uses, according to the terms of Act 13, drilling activities which are inherently industrial in nature will now transcend all zoning boundaries.

117. The zoning classifications made in Act 13 are in direct contradiction to the zoning mandates laid down by the General Assembly, the U.S. and Pennsylvania Supreme Courts and memorialized in the MPC. 53 P.S. § 10101 et seq. Most importantly, because Act 13 allows zoning districts to contain entirely incompatible uses, it is an unconstitutional legislative act in violation of Article I, Section 1 of the Pennsylvania Constitution, is an arbitrary exercise of the Commonwealth's police power and serves to frustrate the Constitutional basis for zoning districts as it no longer bears a rational relation to the health, safety and welfare of the community.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT III – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

III. Petitioner seeks a declaration that Act 13 prevents local municipalities from meeting their Constitutional and statutory obligation to protect the health, safety, morals or welfare of local communities through zoning regulations in violation of the Municipalities Planning Code and Article I, Section 1 of the Pennsylvania Constitution.

118. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

119. In enacting zoning ordinances, the Commonwealth legislature through the MPC requires that the ordinance “give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.” 53 P.S. § 10603(a). If an individual municipality cannot designate which areas in its own community are appropriate for the development of oil and gas activities, it will lose the ability to carry out this statutory mandate encompassed by the MPC. Consequently, Act 13 prevents municipalities from meeting their obligations under the MPC.

120. The MPC places strict limitations on municipal officials requiring that zoning ordinances be enacted for only specific purposes in recognition of the property rights guaranteed by Article I, Section 1 of the Pennsylvania Constitution. *See*, 53 P.S. § 10604.

121. In permitting oil and gas and related operations essentially **everywhere in a municipality** Act 13 is inconsistent with existing Pennsylvania laws which recognize the principal role of **local government** in land use matters. Such laws are based upon the rationale that local governments are in the best position to make determinations of how to protect and promote the health, safety, welfare and morals of the community. The effect is that **all existing local ordinances, zoning schemes and comprehensive plans fall apart**. That is because the Commonwealth has made nearly all oil and gas operations permitted everywhere through Act 13, and consequently has placed the decision of where oil and gas operations will occur solely in the hands of individual gas owners and the oil and gas industry. Thus, a comprehensive zoning plan,

which fundamentally depends upon the predictability of like uses in certain districts and the ability of local governments to control the orderly development of their communities, ceases to function. As individual municipalities can now be faced with the prospect of having hundreds and thousands of wells, miles of pipeline, compressor stations and processing plants, and unlimited hazardous impoundments, zoning fails to serve its once deemed Constitutional function to protect the health and safety of the community by creating zoning districts that serve to separate non-compatible uses.

122. Act 13 usurps Pennsylvania's municipalities' ability to constitutionally employ their police power consistent with the mandates of the MPC to protect important community areas, such as residential neighborhoods, schools, community centers, lakes, cemeteries and parks. For instance, future plans for main street developments will be frustrated given the fact that industrial oil and gas activities may appear anywhere as permitted uses by right, especially if the gas owner is different from the surface owner. Yet, zoning regulations must be designed "[t]o accommodate reasonable overall community growth, including population and employment growth and opportunities for development of a variety of residential dwelling types and non-residential uses." *In re Realen Valley Forge Greenes Associates*, 838 A.2d 718, 729 (Pa. 2003) (citing 53 P.S. § 10604(5)) (emphasis added).⁵

123. Perhaps more significantly, because of Act 13's effect of undermining comprehensive plans and existing zoning districts, the General Assembly has placed municipalities in the unenviable and impossible position of having to choose between complying with Act 13 or taking actions to promote and protect the health, safety, welfare and morals of their citizens as mandated by the Pennsylvania Constitution and the MPC. Without question,

⁵ For instance, Mount Pleasant Township, which is the birthplace of the first Marcellus Shale well, has over one-hundred (100) wells drilled, numerous compressor stations and miles of pipeline. Allowing these operations without zoning controls negates orderly development, overall community growth and the ability or desire to increase residential housing in violation of the MPC.

complying with Act 13 and enacting ordinances that permit by right or allow conditionally industrial oil and gas operations, except processing facilities, in **every district** does not serve to benefit the health, safety, welfare and morals of citizens, frustrates orderly development and comprehensive plans required by the MPC, and therefore is not a Constitutional basis for zoning. As such, Act 13 places municipalities in an untenable position. By enacting laws consistent with Act 13, each municipality will violate its duties under the Pennsylvania Constitution and the MPC to zone for the benefit of the community and consistent with a comprehensive plan for orderly development. By enacting ordinances that violate Act 13, municipalities will face monetary sanctions that could bankrupt their communities.

124. To further illustrate the shift in power from local governments to the oil and gas industry, should an oil and gas company violate a local regulation, the MPC limits fines that a municipality may levy to no more than \$500.00 per day. 53 P.S. § 10617.2. By contrast, should the local government be found in violation of Act 13, the local government could be sanctioned with attorney's fees by the industry in excess of possibly \$1000.00 dollars per hour or more.

125. Where municipal officials previously exercised their proper police powers to ensure the safety of their residents, the oil and gas industry has been given a blank check and the ability to develop municipalities as industry deems fit without oversight or any regard for a municipalities' comprehensive plan, the tax base, orderly development or the people of the local community.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 1 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and

- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT IV – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- IV. **Petitioners seek a declaration that Act 13 is a “special law” which creates unconstitutional distinctions between Pennsylvania municipalities and the drilling industry and other industries in violation of Article III, Section 32 of the Pennsylvania Constitution.**

126. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

127. Article III, Section 32 of the Pennsylvania Constitution provides:

“The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs, or schools districts,

...

7. Regulating labor, trade, mining or manufacturing.

...

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.” PA. CONST. Art. III, Sec 32.

128. Article III, Section 32 of the Pennsylvania Constitution has been interpreted to require that like persons in like circumstances are treated similarly. *Pennsylvania Turnpike Com’n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006). Therefore, the General Assembly is prohibited from passing any “special law” for the benefit of one group to the exclusion of others. *See, Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919). The prohibition against special laws in the Pennsylvania Constitution is understood to include principles of equal protection. *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 (Pa. 1981).

129. Any classification or distinction between groups made in the law must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. *Pennsylvania Turnpike Com’n v. Com.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). In other words, a classification will violate the principles of equal protection if it does not rest upon a difference which bears a reasonable relationship to the purpose of the legislation. *In re Williams*, 234 A.2d 37, 41 (Pa. Super. 1967).

130. A classification may be deemed per se unconstitutional if the classified class consists of one type of member and is substantially closed to other members. *See, In re Williams*, 234 A.2d 37 (Pa. Super. 1967). Where the class to which a statute is made applicable is unnecessarily restricted or improperly selected, the law is “special,” and will be considered unconstitutional. When reviewing special legislation, a court is free to hypothesize the reasons the General Assembly might have had for employing the classification of certain groups. *Pennsylvania Turnpike Com’n v. Com.*, 899 A.2d 1085, 1095 (Pa. 2006).

131. The constitutional prohibition against special laws was adopted to put an end to privileged legislation enacted for private purposes. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132 (Pa. 2000).

A. Uniformity of Local Ordinances - § 3304

132. Section 3304 of Act 13 creates an unconstitutional distinction in violation of equal protection principles. Unlike every other citizen, business or industry seeking to establish operations in a local municipality, the oil and gas industry is not subject to different zoning standards as all other industrial uses are in the same municipality. For instance, all other industrial uses are generally confined to industrial districts. However, oil and gas companies are permitted to put an industrial use in any zoning district without any additional oversight or procedural constraints placed upon them. Moreover, unlike citizens who have limitations on how

they can develop parcels in residential districts, the oil and gas industry has been afforded greater rights. Such special treatment for a selected interest is the cornerstone of an unconstitutional “special law.”

133. The oil and gas industry is the only industry that is permitted to develop land in violation of the Pennsylvania Constitution and the MPC §§ 10601-10605. It can entirely bypass the statutory baselines underlying the constitutionality of zoning, including already-established and designated zoning districts, comprehensive plans and orderly development of the community. Even more, unlike any other industry, the oil and gas industry has been permitted to develop without regard for the localized consideration of the health, safety, and general welfare of surrounding citizens and communities. *See*, § 10604. No other citizen, business, or industry has been granted such “special treatment” to act without any consideration for Constitutional considerations and their statutory embodiments set forth in the MPC⁶.

134. Section 3304 additionally provides that the local review period for oil and gas resources may not exceed thirty (30) days for permitted uses or one-hundred twenty (120) days for conditional uses. Therefore, Act 13 has the effect of requiring local permits to be issued within thirty (30) days in most cases. All other citizens or entities that desire to develop land in a district are required to follow the time constraints and procedures already set forth in the MPC. This special treatment demonstrates that the law benefits one group to the exclusion of others.

135. Although a use may be classified as “permitted” within a given zoning district, applications must still be filed; there are procedures that must be adhered to and standards of review that must be met. A thirty (30) day or one-hundred twenty (120) day time constraint

⁶ Furthermore, municipalities have the statutory ability to regulate air pollution. *See*, 35 P.S. § 4012(a) (“Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, the Clean Air Act ...”). Act 13 has removed this statutory power granted to municipalities to assist in the protection of the environment relative to regulations that may impact solely industrial oil and gas activities.

placed on municipalities essentially eliminates the opportunity for the subdivision and land development application process, eliminates any meaningful review by the municipality and the recourse for landowners to bring timely challenges. *See*, 53 P.S. § 10913.2. The designation of or approval of a “use” is the first step in the approval process that requires multiple reviews and oversight by elected officials, including necessary subdivision and land development review and preliminary and final site plan review by engineers, solicitors, planning commissions and elected officials.

136. In order to pass zoning ordinances or approve applications, municipal officials are required to consider the evidence introduced from these review processes and base their decision off the information gathered. If approval or the zoning ordinance is mandated regardless of the evidence gathered, rather than base the decision of the considerations provided, municipalities will be forced to turn a blind eye to any evidence brought forth in by a landowner in a public hearing or otherwise.

137. Pennsylvania courts have generally held that landowners’ property interests and due process rights may be violated by failing to give public notice or hold a public hearing in accordance with the zoning procedures mandated by the MPC. *See, Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007); *Glen-Gery Corp. v. Zoning Hearing Bd. of Dover Twp.*, 907 A.2d 1033 (Pa. 2006); *Messina v. East Penn Twp.*, 995 A.2d 517 (Pa. Commw. Ct. 2010). “The purpose of requiring compliance with the procedural requirements for enacting township ordinances is premised on the importance of notifying the public of impending changes in the law so that members of the public may comment on those changes and intervene when necessary.” *Schadler*, 850 A.2d at 627. A landowner has a property interest in the quiet use and enjoyment of his property near any proposed use, as well as a right to participate in the governing body’s hearings. *In re McGlynn*, 974 A.2d 525 (Pa. Commw. Ct. 2009).

138. The effect of the Act's provision will be to permit landowners to retain their constitutionally protected due process and appeal rights for all zoning decisions with the exception of those made regarding oil and gas activities where any such rights have been negated as the thirty (30) day provision seems to suggest the thirty (30) day time period is dispositive and no appeal can follow, and that there is no meaningful participation in Public Hearings.

139. All other applicants, including all the taxpaying citizens of each municipality, must follow the process and the time frame set out by the MPC. Pursuant to the time constraints and directives of Act 13, the subdivision and land development application processes will become moot and the appeal process will be different for only one industry. For instance, when considering a conditional use application, the governing body is permitted to hold hearings (more than one) in order to determine whether a use will fit within established standards and criteria, and then render a written decision within forty-five (45) days of the last hearing. 53 P.S. § 10913.2. These provisions of the MPC will not apply to the oil and gas industry in light of Act 13. For all other applicants, there is no one-hundred (120) day limitation for conditional use approval or thirty (30) day timetable for permitted use appeals.

140. There exists no valid constitutional justification for making a classification which effectively exempts the oil and gas industry from local zoning procedures and appeal processes which are employed for the protection of the community. There are plenty of citizens and applicants that would welcome a pass from municipal oversight yet only the oil and gas industry has received such "special treatment."

141. The legislative history for Act 13 reveals that Act supporters touted the benefits of § 3304 as giving the oil and gas industry increased predictability and uniformity as it operates in various locales across the Commonwealth. However, the oil and gas industry is clearly not the

only industry that operates statewide and must comply with differing local regulations. Allowing the oil and gas industry to bypass that which others must comply with as a regular incident of doing business is a “special” consideration and distinction that cannot be justified on any legitimate, rational or constitutionally sufficient basis. The General Assembly has granted favor to an industry by providing it with special treatment not otherwise afforded to other industries or citizens.

142. The legislature cannot provide a reasonable relationship between the classification and the public benefit. When Article III, Section 32 became part of Pennsylvania’s Constitution in 1873, its purpose was to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company or one county. *Wings Field Preservation Associates, L.P. v. Com. Dept. of Transportation*, 776 A.2d 311, 316 (Pa. Commw. Ct. 2001). Catering to an industry not in need of special protection was the initial catalyst for the Pennsylvanian equal protection constitutional amendment. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000). Act 13 therefore achieves precisely what the Constitution prohibits.

143. The Act also creates an unconstitutional distinction between densely populated communities such as the City of Pittsburgh and more sparsely populated communities such as many of the Municipal Petitioners. Densely populated communities such as the City of Pittsburgh and its residents are afforded greater protection and/or privileges under Act 13 than more sparsely populated communities such as Municipal Petitioners and the residents therein.

144. The General Assembly has now mandated by the passage of Act 13 that the full maximum capacity of drilling activity – vertical and horizontal drilling or fracturing, along with the corresponding pipelines, compressor stations, impoundments, processing plants, etc. – must be permitted in nearly every zoning district of a community, including residential areas. Due to their

dense populations and build-out of real estate within their borders, densely populated communities are basically relieved of the burden of drilling by virtue of the set back requirements. In effect, the more sparsely populated communities have now been directed by the General Assembly to shoulder this burden.

145. Article III, Section 32 of the Pennsylvania Constitution was adopted to end “[t]he evil [of] interference of the legislature with local affairs without consulting the localities and the granting of special privileges and exemptions to individuals or favored localities.” *Harrisburg School District v. Hickok*, 781 A.2d 221, 227 (Pa. Commw. Ct. 2001). By its application, these more densely populated communities and their residents are improperly selected to receive special or favorable treatment pursuant to Act 13 while more sparsely populated communities and their residents are left to bear the burden of “oil and gas operations.”

146. As set forth in great length herein, this burden includes, but is not limited to: drilling; drilling rigs and transportation of the same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled spider web of pipelines; installation, construction and placement of impoundment areas; compressor stations and processing plants; and unlimited hours of operation, all of which may take place in residentially zoned areas.

147. The application of Act 13 impermissibly favors densely populated communities, such as the City of Pittsburgh or the City of Philadelphia, and their residents and affords greater protection and/or privileges in relation to oil and gas operations. Being that municipal governments are not permitted to prohibit drilling by way of zoning in residential districts, Act 13 lacks uniformity in violation of Article III, Section 32 of the Pennsylvania Constitution.

148. The difference in treatment between different regions in the Commonwealth is further exacerbated by the fact that shale and/or shale gas is not the same throughout Pennsylvania, nor does it exist in all parts of the Commonwealth. As a result of this geological

reality, Act 13 will not apply to certain areas in the same way it will apply to and affect the Petitioners.

149. Any classification or distinction between groups or localities in law must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. *Pennsylvania Turnpike Commission, v. Com.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). A classification will be struck down if it is based upon artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition. *See, Harrisburg School District v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000). The General Assembly has failed to set forth any basis whatsoever for the distinction between the diverse regions of the Commonwealth, including that between densely populated communities and sparsely populated communities.

B. Attorney Fees and Costs - § 3307

150. Section 3307 imposes attorney fees and costs upon any local government that “enacted or enforced a local ordinance with willful or reckless disregard” of the MPC or the terms of the Act relating to local ordinances.

151. Given Act 13’s local ordinance review provisions, the Act’s “penalty” provisions place excessively onerous punishments upon local governments exclusively when dealing with regulation of the oil and gas industry. In most other cases, a challenge to a local ordinance would merely result in the law being overturned. However, when dealing with local oil and gas ordinances, municipal officials face not only the possibility of the law being overturned, but the possibility of payment of hundreds of thousands of dollars in attorney’s fees and costs..

152. The practical effect of such penalty terms is to discourage local officials from passing laws regulating the oil and gas industry, even though they believe such regulations

would otherwise be in the best interests of the community and consistent with the law, which is their statutorily imposed duty. *See generally*, MPC, *supra*. With the possibility of being sanctioned with attorney fees and costs, local officials will be hesitant to regulate the drilling industry for fear of costing their taxpayers additional funds and ultimately potentially being found personally liable if a surcharge action is implemented for failing to follow the strict statutory directives of Act 13.

153. Furthermore, Act 13 sets up a draconian scheme which makes it nearly impossible for local officials to comply with its terms. All zoning ordinances must comply with Act 13 within one-hundred twenty (120) days of its effective date. *See*, Act 13, at § 3309(b)(4). Failure to comply will result in Municipal Petitioners being subjected to enforcement actions with the threat of incurred costs and fees looming. Yet, Municipal Petitioners are also encouraged to submit their ordinances to the Public Utility Commission for an advisory opinion to determine whether it complies with the terms of Act 13. The Public Utility Commission has **one-hundred twenty (120) days** in which to render its decision. *See*, Act 13, at § 3305. Even if an ordinance is deemed valid by the Public Utility Commission at the end of its consideration period, municipalities still must comply with local advertising and hearing requirements before an ordinance can be amended or passed. Undoubtedly, municipalities will not be able to bring their ordinances into compliance within the allotted time frame. Not only are municipal officials forced to pass a new law, they are prohibited from enforcing current laws on the books leaving them without any viable option to avoid sanctions. This scheme virtually ensures that municipalities may be assessed penalties in any attempt to regulate the oil and industry, **even when it is done in compliance with the terms of Act 13.**

154. In addition, the sanction of attorney's fees is even more pronounced because of how Act 13's local ordinance review provisions interact. Section 3305(b) of Act 13 grants

“aggrieved” parties the power to initially challenge a local ordinance with the Public Utility Commission, an administrative body of the executive branch which is given the power to determine whether the zoning regulation complies with the mandates of Act 13. This process of review for a challenge to the validity of a local zoning ordinance is entirely unique and designed exclusively for the oil and gas industry so that it may initially appear before the Public Utility Commission, an administrative body, rather than a judicially independent avenue which otherwise applies in all other scenarios and citizens pursuant to the MPC.

155. Furthermore, prior to any challenge brought by an “aggrieved” party, a municipality may submit its ordinance to the Public Utility Commission for review so that the administrative body may determine whether the ordinance conforms to the mandates of Act 13. During this review process, municipalities have neither a forum nor a medium in which to advocate their position before the Public Utility Commission and explain why their respective zoning ordinances are constitutionally sound. Regulation of the oil and gas industry is the only municipal zoning activity that may be prematurely reviewed in the foregoing manner and then subject to an advisory opinion. To compound the problem, this advisory opinion will likely later be invoked by parties seeking to challenge an ordinance, and used as a catalyst to invoke the sanction of attorney’s fees that may be imposed upon municipalities for non-compliance.

156. The “special law” also serves to treat municipalities differently. Municipal Petitioners are municipalities with yearly operating budgets ranging from several hundred thousand dollars to an excess of ten (10) million dollars.

157. Municipalities that cannot afford to absorb the prospective of paying excessive attorney’s fees and costs, as is now possible under § 3307, a figure that may bankrupt a smaller municipality, will take less chances and may be forced to be more lenient in its laws. By contrast,

a more affluent municipality may be more aggressive and protective with its regulations as it can better absorb a potential award of attorney's fees and costs.

158. By way of illustration of Act 13's "special" treatment of industry in contrast to local municipal oversight, a company involved in oil and gas midstream operations, a compressor station operator, has written one of the Petitioners, Cecil Township, a letter on how life will be under Act 13. *See*, MarkWest Letter to Cecil Twp., attached hereto as Exhibit 44.

159. In 2011, the operator was denied a special exception in a I-1 area to construct a compressor station as it was determined by the Zoning Hearing Board that the proposed use was not compatible in an I-1 light industrial zone. The issue is currently on appeal. Industry now writes to remind the Township that the Commonwealth disagrees with its analysis of non-compatible uses and the use is now permitted under Act 13. The operator requested a permit and made sure to remind the Township that failure to do so as directed could be met with the sanction of attorney's fees.

160. No other industry could draw upon state law as an impetus to threaten such obvious financial harm to dissuade a municipality from doing what it believes valid, let alone override zoning decisions and designations.

161. The legislature has not provided any constitutional justification for this classification made in Act 13 and the differing treatment between oil and gas drillers and essentially all other industries. Accordingly, Act 13 constitutes a "special law" in violation of the equal protection principles embodied in Article III, Section 32 of the Pennsylvania Constitution.

C. Notification to Public Drinking Water Systems - § 3218.1

162. Section 3218.1 provides that, "[a]fter receiving notification of a spill, the department shall, after investigating the incident, notify any public drinking water facility that could be affected by the event that the event occurred ..." As a result of this provision,

potentially affected public drinking water facilities will be notified by the Pennsylvania Department of Environmental Protection (the “DEP”) in the event an oil and gas driller spills any of its hazardous contaminants on land or into water.

163. By the terms of the Act, no other notifications to any other drinking water sources are required after a spill and possible contamination. The Act creates an unconstitutional distinction between public drinking water supplies and private water wells in violation of equal protection principles. By way of illustration, a recent spill of 480 gallons of diesel fuel was not reported to the local municipality or nearby residents, potentially jeopardizing water supplies, children and farm animals. *See, Diesel Spill Polluted Greene County Waterway*, attached hereto as Exhibit 45.

164. The General Assembly has failed to provide any legitimate basis for the distinction between public and private drinking water supplies. While public drinking water has the benefit of receiving notification of a spill, it is also already routinely tested to ensure compatibility with drinking water standards. As a result, there are no special circumstances or need that would justify public drinking water supplies receiving the benefit of notification to the exclusion of private water wells. Quite the contrary, it is private water wells which can in fact demonstrate a special need for notification. Private water wells are neither publicly monitored nor routinely tested and are far more susceptible to contamination. As the majority of drilling is ongoing in more rural areas serviced by private water sources, the rationale for this exception suggests “special” treatment, different from all other uses in a municipality.

165. As municipalities may have laws that mandate reporting of all spills by all other industries to nearby residents and the municipality itself, consistent with its obligation pursuant to MPC § 10604 that, “provisions of zoning ordinances shall be designed to promote, protect and facilitate any or all of the following ... the provision of a safe, reliable and adequate water supply

for domestic, commercial, agricultural or industrial use,” municipalities face the risk that such laws would now be preempted by Act 13. This provision bears no rational basis to any legitimate public interest and serves to violate § 10604.

166. Act 13 creates a distinction which is entirely arbitrary – the need for public water sources to receive notification of spills and not private water sources is not unique. This sort of special privilege afforded to a selected group rests on an entirely artificial and arbitrary distinction in violation of Article III, Section 32. *See, Laplacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919).

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 32 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT V – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- V. Petitioners seek a declaration that Act 13 is an unconstitutional taking for a private purpose and an improper exercise of the Commonwealth’s eminent domain power in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.**

167. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

168. Section 3241 of Act 13, entitled “eminent domain,” states that, “[e]xcept as provided in this subsection, a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may appropriate an interest in real property located in a

storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.”

169. The United States and Pennsylvania Constitutions mandate that private property can only be taken to serve a public purpose. *In re Opening Private Rd. for Benefit of O’Reilly*, 5 A.3d 246 (Pa. 2010). Private property cannot be taken for the benefit of another private property owner. *Kelo v. City of New London*, 545 U.S. 469 (2005).

170. The Pennsylvania Supreme Court has maintained that to satisfy this obligation of serving a “public purpose,” the public must be the primary and paramount beneficiary of any taking. *In re Opening Private Rd. for Benefit of O’Reilly*, 5 A.3d 246, 258 (Pa. 2010). In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the “real or fundamental purpose” behind a taking. *In re Opening a Private Rd. for Benefit of O’Reilly Over Lands of (a) Hickory on Green Homeowners Ass’n & (b) Mary Lou Sorbara*, WL 1709846 (Pa. Commw. Ct. 2011) (on remand from the Pennsylvania Supreme Court). Stated otherwise, the true purpose must primarily benefit the public. *Id.*

171. The question that must be asked is what public purpose is being served by the appropriation of an interest in real property by a corporation for the storage of natural gas? If such is deemed a “public purpose,” then any oil and gas corporation by analogy should have the right by use of eminent domain powers to acquire real property for the placement of above-ground storage of natural gas, including the use of storage tanks.

172. Moreover, Section 3241 is inconsistent with the limitations on the use of eminent domain under the Property Rights Protection Act. 26 Pa. C.S.A. § 201 *et seq.* Pursuant to the Act, except as set forth in § 204(b), the exercise by any condemnor of the power of eminent

domain to take private property in order to use it for private enterprise is prohibited. Specifically, the appropriation of an interest in real property by a corporation for the storage of natural gas is not listed as an exception under § 204(b).

173. Because it cannot be justified on the basis of any paramount public purpose, Section 3241 of Act 13 facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional taking in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT VI – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- IV. **Petitioners seek a declaration that Act 13 unconstitutionally violates Article I, Section 27 of the Pennsylvania Constitution by denying municipalities the ability to carry out their constitutional obligation to protect public natural resources.**

174. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

175. Article I, Section 27 of the Pennsylvania Constitution states the following:

The people have a right to clean air, pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

Pa. Const. Art. I, Sec. 27 (the "Environmental Rights Amendment").

176. Each governmental body has a role in implementing Article I, Section 27.
177. The Environmental Rights Amendment obligates municipalities to protect the environment.
178. Municipalities, as agents of the Commonwealth, share duties as trustees to conserve and maintain Pennsylvania's public natural resources for the benefit of its citizens. *United Artists Theater Circuit v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993).
179. "[M]unicipal agencies have the responsibility to apply the Section 27 mandate as they fulfill their respective roles in planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well ..." *Community College of Delaware County v. Fox*, 342 A.2d 468, 482 (Pa. Commw. 1975).
180. Act 13 violates the Pennsylvania Constitution because it prevents municipalities from carrying out their constitutional obligations under the Environmental Rights Amendment.
181. Act 13 eliminates the central role municipalities must play in protecting the health, safety, and welfare of their communities.
182. Act 13 essentially requires a municipality to allow industrial uses in non-industrial areas with little ability to protect the surrounding resources and community.
183. The Act also deprives municipalities of any meaningful role in state permitting, including eliminating municipalities' rights to appeal DEP permitting decisions for oil and gas well permits. (Sec. 3215(d)).
184. As the Pennsylvania Supreme Court found in *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263 (1976):

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these

broad purposes and establish these relationships; the amendment does so by its own Ipse dixit.

But merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief. The new amendment speaks in no such absolute terms. The Commonwealth as trustee, bound to conserve and maintain public natural resources for the benefit of all the people, is also required to perform other duties, such as the maintenance of an adequate public highway system, also for the benefit of all the people. See Sections 11 and 13(a) of Act 120, 71 P.S. 511, 513(a). ***It is manifest that a balancing must take place....***

Payne v. Kassab, 468 Pa. 226, 246, 245, 361 A.2d 263 (1976) (emphasis added); see *Del-AWARE, Unlimited, Inc. v. Commonwealth Dep't of Env'tl. Res.*, 508 A.2d 348 (Pa. Commw. Ct. 1986); *Pa. Env'tl. Mgt. Serv., Inc. v. Commonwealth Dep't of Env'tl. Res.*, 503 A.2d 477, 479-80 (Pa. Commw. Ct. 1986).

185. The General Assembly has denied Pennsylvania municipalities the ability to strike a balance between the development of minerals and “the preservation of the natural, scenic, historic and esthetic values of the environment.”

186. The General Assembly has denied Pennsylvania municipalities the ability to strike a balance between the development of minerals and “the preservation of the natural, scenic, historic and esthetic values of the environment.”

187. The Pennsylvania Supreme Court has unequivocally recognized that municipalities have a duty to protect the environment:

Whatever affects the natural environment within the borders of a township or county affects the very township or county itself. Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed, a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and the quality of life. ... Aesthetic and environmental well-being are important aspects of the quality of life in our society, *and a key role of local*

government is to promote and protect life's quality for all of its inhabitants.

[A]mong the responsibilities of local government is the protection and enhancement of the quality of life of its citizens. Indeed, it is a constitutional charge which must be respected by all levels of government in the Commonwealth.

Franklin Tp. v. Com., Dept. of Environmental Resources, 500 Pa. 1, 452 A.2d 718, 721-22 (1982) (emphasis added); *see also*, *Community College of Delaware County v. Fox*, 20 Pa. Commw. 335, 342 A.2d 468 (1975) (holding that the Department of Environmental Resources could not consider aspects of planning and zoning, and did not have the authority to withhold a permit on non-statutory environmental and land use criteria; instead, these are the concern and responsibility of municipal agencies).

188. Act 13 cuts off municipalities from playing their constitutionally mandated role in environmental protection and leaves a gap in regulatory protection that is contrary to dictates of the Environmental Rights Amendment.

189. Consistent with the requirements of the Environmental Rights Amendment, state law has long mandated and authorized an active role for municipalities in utilizing zoning ordinances and other local regulations to protect their communities' natural, cultural and historic resources.

190. For instance, the Municipalities Planning Code ("MPC") mandates that zoning ordinances "shall be designed . . . to promote, protect and facilitate . . . practical community development and proper density of population; . . . the provisions of adequate light and air, . . . the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, . . . as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains"). 53 P.S. § 10604(1). The MPC further requires that, "[z]oning ordinances shall protect prime agricultural

land andshall provide for protection of natural and historic features and resources”); 53 P.S. §10603 (g)(1), (2). In addition, the MPC gives municipalities the authority to enact ordinance “provisions to promote and preserve prime agricultural land, environmentally sensitive areas and areas of historic significance,” 53 P.S. §10603(c)(7); and to “include provisions regulating the siting, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies to support the intended land uses within the capacity of available water resources”). 53 P.S. §10603 (d); see also, 35 P.S. § 4012(a) (“Nothing in [the Air Pollution Control Act] shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act, or the Clean Air Act . . .”).

191. Compliance with Act 13 will require municipalities to act in conflict with their state statutory and regulatory obligations to utilize zoning to protect their high quality streams, prime farmland, limited water supplies, critical environmental areas, historic resources, the Appalachian Trail and designated Wild and Scenic rivers. *See* 25 Pa. Code § 9.126(a) (“Actions at the Commonwealth level are not able to provide fully for the protection of watersheds with high quality streams. The power to control land use directly is mainly in the hands of local governments.”); 25 Pa. Code § 9.114(b) (“Land use controls ... shall be in support of environmentally sensitive land policy planning at all levels of governments”); 5 Pa. Code § 9.155 (a) (recognizing the central role local governments play in addressing the problems of regions with limited water supply”); 25 Pa. Code § 9.201(b) (“the implementation of critical areas policies must be a responsibility shared by State, regional, county and municipal agencies”); 37 Pa.C.S.A. § 102 (recognizing the role of local governments in carrying out state historic preservation policies); 64 P.S. § 804 (requiring municipalities to enacting zoning ordinance provisions “to preserve the natural, scenic, historic and esthetic values of the [Appalachian Trail]

and to conserve and maintain it as a public natural resource”); 35 P.S. § 6018.401, et seq., 25 Pa. Code §§ 269a.21-269a.50 (applicants for hazardous waste treatment and disposal facilities must demonstrate compliance with local land use standards; DEP is obligated to consult with other governmental agencies in making a determination as to whether significant environmental harm may occur from an applicant’s proposed siting of such a facility); see also, the National Wild & Scenic Rivers Act of 1968, 16 U.S.C.A. §§ 1271--1287 and the Pennsylvania Scenic Rivers Act, 32 P. S. §§ 820.21--820.29; see also, 4 Pa. Code § 1.472(a)(3), (a)(5), (a)(7), (a)(9), Final River Management Plan, p. 29, 24 (to avoid federal land acquisition through eminent domain municipalities must implement and enforce “comprehensive plans and land use regulations ... for protection of the land and water resources of the river and the river corridor”).

192. If industrial drilling operations take place in a “recharge” area which serves as the source of water for a given community, municipalities are powerless to protect the water source should a spill or other contamination occur. A recharge area is where water, after rainfall, snowfall or another precipitation event occurs, enters the ground, becoming groundwater where it then seeps through spaces between particles of unconsolidated material or through networks of fractures and openings in consolidated rocks making its way down to the aquifer. As this water travels from the recharge area to the aquifer, it comes in contact with minerals from the rock and sand it flows through as well as contaminants that have been spilled or released into the soil from drilling operations. As a result, water coming into contact with contaminants in a recharge area undergo chemical and physical changes. Given that groundwater movement can take hours or years depending upon the depth of the aquifer, if the water comes into contact with volatile organic chemicals (VOCs) which are used extensively in oil and gas operations, many VOCs do not degrade quickly and can remain in groundwater and the aquifer for years and even decades.

Therefore, it is imperative that private water supplies, like springs and wells, which people depend upon for domestic use be protected.

193. Act 13 prevents Municipal Petitioners from carrying out their constitutional obligations as trustees of our public natural resources.

194. As trustees, Municipal Petitioners have a fiduciary obligation to ensure that all decisions affecting trust resources meet the requirements of the Environmental Rights Amendment.

195. Municipal Petitioners have a duty to evaluate the immediate and long-term impacts, both discrete and cumulative, on each element of the public trust resources and on the public's right to future enjoyment of these resources.

196. Act 13 has taken away municipalities' ability to act on evaluations of the potential impacts of oil and gas operations as it relates to municipal zoning districts, and has thereby denied Municipal Petitioners the ability to carry out these constitutional obligations.

197. Each aspect of "oil and gas operations" presents risks. Prior to Act 13, municipalities could have addressed these risks and carried out their constitutional mandates through zoning provisions that address local community development objectives, local natural resources and existing land uses. Act 13 eliminates municipalities' ability to carry out their constitutional mandates as illustrated below:

a. *Well location assessment operations, including seismic testing*

- i. Before gas drilling begins, well location assessment must occur to determine where oil and natural gas deposits are located such that extraction can be optimized.
- ii. Seismic testing is commonly employed, and can involve two different methods. One method involves using small explosive charges dropped

into holes drilled in the ground, which are then set off and create vibrations. A second method involves large seismic vibration trucks, which use a metal plate device to create vibrations. These vibrations allow for the mapping of underground deposits.⁸

- iii. Vibrations can negatively affect nearby water wells and structures if seismic testing is conducted in close proximity, especially if charges are used. Also, as the trucks are quite large and can weigh around 50,000 pounds,⁹ damage to farmfields and forested areas can result if the trucks are used off-road and land-clearing is necessary.
- iv. Before Act 13, municipalities could have carried out their constitutional mandates and mitigated these impacts by:
 - (1) requiring greater setbacks from homes, business, and historic properties than in industrial areas to lessen the impact and distraction of vibrations;
 - (2) creating a historic district overlay, where seismic testing is limited; or
 - (3) limiting seismic activity in areas subject to landslides, because of steep slopes, or subsidence, because of undermining.
- v. Act 13 requires municipalities to allow well and pipeline location assessment operations in all zoning districts, so long as it complies with laws governing explosives. Well location assessment must be allowed as a use permitted by-right, and municipalities are prohibited from increasing the 300 foot setback applicable to such operations. As a result, under Act

⁸ <http://www.naturalgas.org/naturalgas/exploration.asp>

⁹ “Seismic Testing: What’s it All About?” <http://extension.psu.edu/naturalgas/webinars/recorded/seismic-testing-what2019s-it-all-about/dennis-langlois-january-19-2012-powerpoint/view>

13, a municipality retains almost no ability to mitigate the impacts of such operations.

b. *Wellsite preparation and drilling operations*

- i. Natural gas well sites develop in different stages and are, on average, several acres in size. Prior to the start of operations, land must be cleared for access roads, the well pad, and any ancillary operations, impacting local forested areas and prime farmland.
- ii. Drilling entails twenty-four (24) hour operation of sizeable drilling rigs accompanied by numerous diesel engines to provide power to the site.
- iii. Unconventional drilling, including operations in the Marcellus Shale, relies on the combination of horizontal drilling technology and hydraulic fracturing technology. Unlike conventional vertical drilling and low pressure well stimulation, operations in the Marcellus and other unconventional formations rely on slick water, high volume, high pressure hydraulic fracturing and horizontal drilling, raising concerns given the different nature of the operations.
- iv. The construction and use of each well pad, as well as the construction and use of associated pits, roadways, pipelines and other related structures and land use changes, result in localized soil disturbances and compaction, erosion and sediment pollution of waterbodies, nonpoint and point source pollution, and stormwater runoff, which can contaminate local agricultural lands with industrial pollutants and threaten local drinking water sources

not only for humans, but also livestock and companion animals.¹⁰ As two examples:

- (1) A Spring 2011 Duke University study found systematic evidence of methane contamination of drinking water from gas extraction activities in at least three areas of Pennsylvania where gas drilling has been occurring for several years. This peer reviewed study found potentially explosive levels of methane in private drinking water wells located in active gas extraction areas where the gas wells were within one kilometer of the water wells. The isotopic “signature” of the methane found in drinking water pointed to thermogenic methane sources more so than biogenic sources. Thermogenic materials are from deep geologic zones such as the Marcellus Shale, while biogenic methane is produced from sources much closer to the surface.
 - (2) On May 17, 2011, the Pennsylvania Department of Environmental Protection fined Chesapeake Energy \$1.1 million dollars for contaminating well water and causing a tank fire during well drilling operations.¹¹ Chesapeake’s improper casing and cementing of wells allowed natural gas to seep into groundwater, contaminating the water supply of 16 families.
- v. Prior to Act 13, municipalities could have carried out their constitutional mandates by using zoning tools to address the intensity of these

¹⁰ Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, New Solutions, 2012, at 54-61.

¹¹“ DEP Fines Chesapeake Energy More Than \$1 Million,” <http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=17405&typeid=1>; “Pennsylvania fines Chesapeake Energy \$1.1 million,” <http://www.businessweek.com/ap/financialnews/D9N9C7981.htm>.

operations, as well as their impacts on neighborhoods, agricultural operations, and local resources. These tools included:

- (1) Allowing extractive uses, including drilling operations, as uses permitted by-right only in industrial districts, and as conditional uses or prohibited in others. This is based on the often-continuous nature of such operations, and the noise, light, dust, emissions, and potential for leaks, blowouts, and explosions. An example could include conditional use approval for drilling operations in agricultural districts with standards designed to “encourage the continuity, development and viability of agricultural operations.” Section 603(h).
 - (2) More protective setbacks to decrease the risk of harm to livestock, agricultural water supplies, and crops;¹²
 - (3) Overlay districts to protect prime agricultural soils where they are located in the municipality;
 - (4) Resource protection districts, such as groundwater protection zones, or conservation districts, where development could be particularly damaging to important local resources;
 - (5) Historic district overlays, to provide added protection for historic properties and landmarks without burdening an entire zoning district.
- vi. Now, under Act 13, municipalities must allow drilling operations in every single zoning district as a use permitted by-right, including residential districts. The Act leaves no meaningful authority for a municipality to protect residential districts.

¹² See Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, New Solutions, 2012, at 71.

c. *Hydraulic fracturing and well completion*

- i. Once the full length of the well is drilled, small explosive charges are set off at the end of the well to blow holes in the production casing so that fracturing fluid can be introduced to the shale. A mixture of millions of gallons of water, fine sand (or another type of “proppant”), and tons of different chemicals, including many carcinogenic, toxic and hazardous substances, are injected into the perforated casing. This is done at pressures high enough to rupture the shale formation and create fractures from which the trapped natural gas can flow into the production casing and flow up the well to the surface.
- ii. This fluid flows back to the surface, in addition to highly salty water from the formation itself, which must be stored and managed onsite until it can be transported for offsite treatment and disposal. This process may take several weeks and is extremely noisy, can require hundreds of heavy tanker-trucks going to and from the site twenty-four (24) hours a day.
- iii. Once all the wells have been fractured and casing is completed, flaring typically will occur, which will result in an open flame for up to several weeks in duration.
- iv. The final pad may have a number of features such as wellheads, condensate tanks, vapor destruction units with open flames, pipelines, and metering stations. The final well site may still be more than one (1) acre. All of these items require ongoing truck traffic and maintenance for the life of the site.

- v. As some municipalities have several different layers of shale, i.e., the Marcellus, Utica, and Upper Devonian, this well drilling, fracturing, and completion process can be repeated several times, tripling the industrial activities. Moreover, companies may return to rework existing wells, or to drill more on the pad.
- vi. These operations pose risks to property, health, and local resources due to the threat of spills and also loss of control that can result in fracturing fluids and other drilling material spraying onto adjacent property, livestock fields, and local waterways. An April 2011 incident resulted in thousands of gallons of fluid flowing from the well into a tributary of the Susquehanna River.¹³
- vii. High-volume hydraulic fracturing also can require anywhere from hundreds to one thousand tanker truck trips to a wellsite. These trucks are used to transport the millions of gallons of water and thousands of gallons of chemicals needed for such operations. The increased truck traffic presents a major risk of serious vehicular accidents as these large trucks travel down rural roads never designed to handle such traffic.
- viii. Prior to Act 13, municipalities could have carried out their constitutional mandates and mitigated these impacts by limiting the districts in which operations could be located, which could decrease localized exposure to dust, noise, chemical emissions, and the potential for property damage due to blowouts. Zoning has also provided municipalities with a way to direct drilling operations into areas of the municipality more capable of handling

¹³ Pittsburgh Post-Gazette, "Bradford County shale well spews fluids," *available at* <http://old.post-gazette.com/pg/11111/1140850-503-0.stm>

heavy truck traffic, such as areas directly off a main highway. A municipality could also require more protective setbacks from schools, hospitals, and nursing homes, where the potential for adverse health impacts could be greater.

- ix. Now, under Act 13, these operations must be permitted by-right in every zoning district, with no meaningful ability to protect the character of residential neighborhoods, and citizens' health, safety, and property from such operations. The Act's setbacks allow a several acre wellsite, including hydraulic fracturing operations, to be 500 feet from an existing building, regardless of the neighborhood or surrounding land uses. Oil and gas pipelines and access roads can be directly next to a building. The Act prevents municipalities from increasing any of these setbacks, regardless of the risks posed in a particular location.

d. *Impoundments*

- i. Similarly, wastewater impoundments, store millions of gallons of fluids that include a mixture of chemicals, such as benzene, toluene, ethylbenzene, and xylene ("BTEX"); microbiocides; glycols; glycol ethers; and petroleum products, some of which are carcinogenic.¹⁴ Flowback water, brought to the surface in the hydrofracking process, and formation or "produced" water, will contain these additives and other potential contaminants. These chemicals become more concentrated as

¹⁴ New York State Dept. of Env't'l Conservation, Revised Draft Supplemental Generic Environmental Impact Statement, Chapter 5, at 5-46 through 5-66, http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch50911.pdf ("NY DEC Revised DSGEIS Ch. 5").

water evaporates from an open impoundment, and open impoundments can release VOCs into the air.¹⁵

- ii. Impoundments containing flowback water, produced water, and other constituents such as drilling mud and cuttings pose a serious health risk to livestock, humans, and companion animals that come into contact with the water. For instance, peer reviewed reports document that tears in wastewater impoundments have lead to soil contaminated with strontium, chloride, sulfate, and sodium and the loss of livestock.¹⁶
- iii. Prior to Act 13, municipalities could have carried out their constitutional mandates and mitigated against these harms by:
 - (1) Requiring wider setbacks from impoundments to decrease the risk of harm to livestock, agricultural water supplies, and crops;¹⁷
 - (2) Utilizing overlay districts to protect prime agricultural soils where they are located in the municipality;
 - (3) Prohibiting impoundments in residential and agricultural districts; or
 - (4) Directing impoundments into district near main highways, to prevent heavy truck traffic in residential areas.
- iv. Now, under Act 13, municipalities must allow impoundments as uses permitted by-right in every zoning district so long as the impoundment is 300 feet from an existing building. A municipality is prohibited from increasing this setback, even if a greater setback is warranted due to the

¹⁵ Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, New Solutions, 2012, at 71.

¹⁶ Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, New Solutions, 2012, at 64-66.

¹⁷ Michelle Bamberger & Robert E. Oswald, *Impacts of Gas Drilling on Human and Animal Health*, New Solutions, 2012, at 71.

presence of highly-populated residential neighborhoods, agricultural areas with livestock operations, or important groundwater resource areas.

e. Processing Plants

- i. Natural gas processing facilities are used to refine natural gas into “pipeline quality” gas that can be transported via a transmission line.¹⁸ natural gas processing facility is essentially a refinery for natural gas before it can be transported in a transmission line.¹⁹
- ii. The entire refining process can include desulphurization, nitrogen extraction, methane removal, and fractionation, which is the separation of natural gas liquids. Processing requires a number of chemicals as well, including amines, which are used to remove sulfur from the gas, solvents, and refrigerants.²⁰ Processing facilities may also contain condensate tanks and evaporators.
- iii. Natural gas processing facilities pose a risk of fire and explosion, and of contamination to surrounding soils, local streams, and groundwater resources. They also create a source of noise and light that can disturb adjacent property owners, as well as livestock operations.
- iv. In addition, processing facilities are a significant source of emissions.
- v. Before Act 13, municipalities could carry out their constitutional mandates and mitigate against these risks by, for instance:

¹⁸ <http://www.arcticgas.gov/sites/default/files/documents/2006-eia-ng-processing.pdf>, at 3.

¹⁹ See photos at http://www.naturalgas.org/naturalgas/processing_ng.asp

²⁰ “Natural Gas Processing: The Crucial Link Between Natural Gas Production and its Transportation to Market,” <http://www.arcticgas.gov/sites/default/files/documents/2006-eia-ng-processing.pdf>, at 4.

(1) prohibiting processing facilities in agricultural districts to “encourage the continuity, development and viability of agricultural operations.”

Section 603(h); and

(2) imposing greater setbacks from processing plants, particularly from adjoining lots.

vi. Act 13 removes this ability and consequently, a processing facility can be built up to 200 feet from an adjoining lot owner, regardless of whether that lot is residential, agricultural, or commercial.

f. Further, Act 13 assumes that all municipalities maintain agricultural districts that are separate from residential districts. However, for instance, Nockamixon Township has both a “Residential/Agriculture” (“R/A”) and “Residential” district. The Act is silent on how municipalities like Nockamixon are to apply Act 13’s sharp distinction between residential and agricultural districts.

g. *Compressor Stations*

i. Compressor stations are most commonly large buildings sited on several acres of land that gather gas from multiple wells,²¹ remove impurities such as water, and compress the gas for pipeline transport²² through the use of gas-powered engines or turbines, or electric motors.²³

²¹ New York State Dept. of Env’tl Conservation, Revised Draft Supplemental Generic Environmental Impact Statement, Chapter 5, at 5-142, http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch50911.pdf (“NY DEC Revised DSGEIS Ch. 5”).

²² Pipeline and Hazardous Materials Safety Administration, “Compressor Stations,” <http://primis.phmsa.dot.gov/comm/NGCompressor.htm>.

²³ New York State Dept. of Env’tl Conservation, Revised Draft Supplemental Generic Environmental Impact Statement, Chapter 6, Part A, at 6-107, http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6a0911.pdf (“NY DEC Revised DSGEIS Ch. 6”).

- ii. Dehydrators remove water vapor from the gas, typically by using a chemical such as tri-ethylene glycol.²⁴
- iii. If the gas is “wet,” meaning it has hydrocarbons present, separators and condensate tanks may be necessary. Separators remove brine²⁵ and condensate from the gas, which is typically water and a mix of hydrocarbons.²⁶ The separator divides the natural gas and other vapors from the condensate, which drops into a condensate tank.²⁷
- iv. Condensates are composed of aromatic hydrocarbons such as benzene, toluene, xylene and ethyl-benzene (“BTEX”). *See*, Exhibit 13.
- v. Likewise, compressor stations release aromatic organic chemicals into the air and also release benzene, toluene along with other volatile organic compounds. *See*, Exhibit 13.
- vi. Consequently, these operations create a high risk for leaks and spills to neighboring properties, including farms, homes, preserved open spaces, and commercial businesses.
- vii. They also pose a fire and explosion hazard as illustrated by compressor station fires in 2011 in Bedford and Washington Counties.²⁸

²⁴ NY DEC Revised DSGEIS Ch. 5, at 5-140; George Jugovic Jr., Regional Director, Pa. Dept. of Env’tl Protection Southwest Regional Office, Presentation at Fayette County Marcellus Shale Task Force Meeting, at 15, <http://gaspgh.org/wp-content/uploads/2011/01/Fayette-County-Marcellus-Jugovic-3.pdf>.

²⁵ NY DEC Revised DSGEIS Ch.5 at 5-139 to 5-140.

²⁶ NY DEC Revised DSGEIS Ch. 6, Part A, at 6-104 to 6-105,

²⁷ *Id.*

²⁸ Bedford County incident: <http://stateimpact.npr.org/pennsylvania/jp/natural-gas-compressor-station-fire-forces-evacuations/>; <http://tribune-democrat.com/local/x57155641/BREAKING-NEWS-Natural-gas-compressor-station-fire-forces-evacuations-near-Bedford-County-Maryland-line>; others: <http://old.post-gazette.com/pg/11285/1181540-100.stm>; <http://marcellusdrilling.com/2011/03/cause-of-fire-at-markwest-compressor-station-in-western-pa-was-faulty-water-heater/>

- viii. Noise and vibrations can also present problems for nearby homeowners, in addition to livestock operations, as illustrated by a compressor station in Herrick Township located among nine homes.²⁹
- ix. Prior to Act 13, municipalities could have carried out their constitutional mandates and mitigated against these risks by:
 - (1) Allowing compressor stations as uses permitted by-right only in industrial districts.
 - (2) Prohibiting compressor stations in residential districts.
 - (3) Prohibiting or permitting as a conditional use in agricultural districts.
 - (4) Requiring that compressor stations, if permitted as conditional uses in commercial districts, meet noise standards for industrial uses that maintain the character of the neighborhood.
 - (5) Establishing setbacks from lot lines and buildings that protect adjacent property owners and their operations should a fire, explosion, or leak occur.
- x. Act 13 removes this ability from municipalities. Act 13 requires compressor stations as uses permitted by-right in agricultural and industrial districts, and as conditional uses in all other districts including residential areas. It also prevents municipalities from applying noise standards to compressor stations even though all other industrial uses must abide by such standards if placed in a commercial area. Act 13 also prevents municipalities from increasing setbacks to protect adjacent

²⁹ "Residents Complain of Location of Compressor Station in Herrick Township," <http://thedailyreview.com/news/residents-complain-of-location-of-compression-station-in-herrick-township-1.1289456>

property owners, even where 750 feet is insufficient to prevent vibrations from rattling nearby homeowners.

198. Municipal Petitioners, as trustees, have a reasonable basis to conclude that the use of land within their communities for oil and gas operations will cause degradation and diminution of trust resources.

199. Act 13 deprives municipalities of their ability to carry out their obligations as trustees and to protect trust resources, and thereby violates Article I, Section 27 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article I, Section 27 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT VII – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

VII. Petitioners seek a declaration that the delegation of powers to the Pennsylvania Public Utility Commission in Act 13, Section 3305 is an unconstitutional breach of the doctrine of Separation of Powers of Government.

A. Section 3305(a) of Act 13 is an unconstitutional violation of the separation of powers of government because it allows an agency of the executive branch of government to play an integral role in the crafting of legislation.

200. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

201. Act 13 fundamentally upsets the notions of Separation of Powers and Checks and Balances that have been the hallmark of the government of the United States and the Commonwealth of Pennsylvania since the 1780's, with the legislature in charge of making laws, the executive overseeing enforcement and the judiciary responsible for interpretation. *Wayman v. Southard*, 23 U.S. 1 (1825). Each branch of government has its own unique powers that are not shared with other branches. *Citizens' Savings and Loan Ass'n v. City of Topeka*, 87 U.S. 655 (1874).

202. Zoning is a uniquely legislative act. *Best v. Zoning Board of Adjustment of the City of Pittsburgh*, 393 Pa. 106, 111, 141 A.2d 606, 610 (1958). Just as enactments of the Pennsylvania General Assembly are presumed to be constitutionally valid, the legislative enactments of municipalities, ordinances, are also presumed to be constitutionally valid. *Bilbar Construction Co. v. Easttown Township Bd. of Adjustment*, 393 Pa. 62, 71, 141 A.2d 851, 856 (1958).

203. Pursuant to the doctrine of the Separation of Powers between branches of government, only the judicial branch of government is entrusted with making determinations regarding the constitutionality of legislation. *In re Investigation by Dauphin County Grand Jury, September 1938*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938). Because the legislative branch of government possesses the sole power to draft laws, and these laws are presumed to be constitutionally valid, legislative bodies have no legal right or standing to seek an advisory opinion regarding legislation from another branch of government without the existence of a dispute regarding the legislation. *Township of Whitehall, v. Oswald*, 400 Pa. 65, 68-69, 161 A.2d 348, 349-50 (1960) (stating that advisory opinions "encourage legislative irresponsibility").

204. Act 13 violates the Separation of Powers doctrine because it vests the Pennsylvania Public Utility Commission, an executive agency of the Commonwealth of

Pennsylvania, with the authority to provide municipalities with advisory opinions regarding the validity of proposed ordinances. Section 3305 of Act 13 states:

(a) Advisory opinions to municipalities

1. A municipality may, *prior to the enactment* of a local ordinance, in writing, *request the commission to review a proposed local ordinance* to issue an opinion on whether it violates the MPC, this chapter or Chapter 32 (relating to development).
2. Within 120 days of receiving a request under paragraph (1), the commission shall, in writing, *advise the municipality* whether or not the local ordinance violates the MPC, this chapter or Chapter 32.
3. An opinion under this subsection shall be advisory in nature and not subject to appeal.

205. As clearly set forth in *Bilbar Construction Co. and Township of Whitehall*, the system of government in the United States and in the Commonwealth of Pennsylvania does not allow legislative bodies to seek advisory opinions from other branches of government regarding legislation.

206. Although Section 3305(a) of Act 13 is unconstitutional on its own, Section 3305(a) is merely part of a broader, unconstitutional scheme, whereby the Pennsylvania General Assembly has deliberately created a dynamic in which the executive branch of government effectively drafts legislation.

207. If Municipal Petitioners enact ordinances or enforce ordinances that are contrary to Act 13, monetary sanctions may be imposed upon them:

a. If the court determines that the local government enacted or enforced a local ordinance with *willful or reckless disregard of the MPC*, this chapter or Chapter 32 (relating to development), it may *order the local government to pay the plaintiff reasonable attorney fees* and other reasonable costs incurred by the plaintiff in connection with the action.

Act 13, at § 3307(1).

208. Read together, Sections 3305(a) and 3307(1) of Act 13 effectively force municipalities to surrender their legislative functions to the executive branch of government. As caretakers of citizens' tax dollars, Municipal Petitioners do not want to be forced to transfer these public funds to opponents' private law firms if Municipal Petitioners lose an ordinance challenge, which may subject to Municipal Petitioners to personal liability for breaching fiduciary duties.

209. Section 3305(a) of Act 13 allows the Public Utility Commission to pass judgment on draft ordinances, but these determinations are not subject to appeal. As such, if the Public Utility Commission advises a municipality that its ordinance is not in conformance with the MPC and/or Act 13, the municipality may either change the ordinance according to the directive of the executive branch agency or refuse to enact the ordinance and be subject to a court challenge, wherein the Public Utility Commission's finding could be entered as evidence of the municipality's willful or reckless disregard of the MPC or Act 13.

210. Conversely, if a municipality enacts an ordinance without seeking the advice of the Public Utility Commission and a court determines that the ordinance is contrary to the MPC and/or Act 13, the municipality's failure to present the draft ordinance to Public Utility Commission would undoubtedly be used as evidence of the municipality's reckless conduct.

211. In sum, Sections 3305(a) and 3307(1) of Act 13 function as a unified scheme wherein Municipal Petitioners are left with no choice but to surrender their legislative functions to the edicts of an executive branch agency, the Pennsylvania Public Utility Commission. Neither the United States Constitution nor the Pennsylvania Constitution condones such a result. *See, Bilbar Construction Co.; Twp. of Whitehall.*

B. Section 3305(a) of Act 13 is an unconstitutional violation of the separation of powers of government because it vests the executive branch of government with the power to determine the constitutionality of laws.

212. As noted *supra*, only the judicial branch of government has the power to make determinations regarding the constitutionality of legislative enactments. *In re Investigation by Dauphin County Grand Jury, September 1938*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938); *First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission*, 556 Pa. 258, 727 A.2d 1110, 1112 (1999); *Commonwealth v. Mockaitis*, 575 Pa. 5, 824 A.2d 488, 499 (2003).

213. Despite this well-settled principle of law, Act 13 vests the Pennsylvania Public Utility Commission with the power to decide the constitutionality of municipal legislative ordinances, in Section 3305(b):

(b) Orders.

(1) An owner or operator of an oil or gas operation, or a person residing within the geographic boundaries of a local government, who is aggrieved by the enactment or enforcement of a local ordinance ***may request the commission to review the local ordinance of that local government to determine whether it violates the MPC, this chapter or Chapter 32.***

(2) Participation in the review by the commission shall be limited to parties specified in paragraph (1) and the municipality which enacted the local ordinance.

(3) Within 120 days of receiving a request under this subsection, ***the commission shall issue an order to determine whether the local ordinance violates the MPC, this chapter or Chapter 32.***

(4) An order under this subsection shall be subject to de novo review by the Commonwealth Court. A petition for review must be filed within 30 days of the date of service of the commission's order. The order of the commission shall be made part of the record before the court.

Act 13, Section 3305(b) (emphasis added).

214. The mandates in Section 3305(b) of Act 13 represent the Pennsylvania General Assembly's fundamental misunderstanding of the purpose and extent of the zoning power. Whereas the MPC provides municipalities with guidance regarding the necessary considerations

before zoning ordinances may be enacted, these requirements are not rooted in the MPC; they are a codification of *constitutional requirements and standards*.

215. Accordingly, because the power to zone is based on protection of constitutional rights, any challenge to the provisions in a zoning ordinance is necessarily constitutional in nature, because a legislature cannot constitutionally enact any zoning ordinance that is not a proper use of the sovereign's police power and does not benefit the health, safety, morals and general welfare of the community. *Village of Euclid, Ohio v. Ambler Realty, Co.* 272 U.S. 365, 47 S.Ct. 114 (1926).

216. Therefore, a challenge to a zoning ordinance that is presented to the Pennsylvania Public Utility Commission would not merely be limited to whether the ordinance violated the MPC and/or Act 13. Instead, the challenge would require the Pennsylvania Public Utility Commission, an executive branch agency, to pass judgment as to the *constitutionality* of the law. This is not permissible and is a violation of the doctrine of separation of powers. *In re Investigation by Dauphin County Grand Jury, September 1938*, 332 Pa. 342, 352-53, 2 A.2d 804, 807 (1938); *First Judicial Dist. of Pennsylvania v. Pennsylvania Human Relations Commission*, 556 Pa. 258, 727 A.2d 1110, 1112 (1999); *Commonwealth v. Mockaitis*, 575 Pa. 5, 824 A.2d 488, 499 (2003).

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of the separation of powers principle embodied in the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT VIII – DECLARATORY JUDGMENT

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

VIII. Petitioners seek a declaration that the delegation of powers to the Pennsylvania Department of Environmental Protection in Act 13, Section 3215(b)(4) allowing the agency to grant waivers without defined standards is an unconstitutional breach of the doctrine of Separation of Powers embodied in the Pennsylvania and United States Constitutions.

217. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

218. Section 3215(a) of Act 13 provides in part that, “...the well operator shall be granted a variance from the distance restriction upon submission of a plan identifying the additional measures, facilities or practices as prescribed by the department to be employed during well site construction, drilling and operations.”

219. Section 3215(b) provides additional limitations in terms of purported minimum setbacks for well sites and disturbed areas from “solid blue lined stream, spring or body of water” and from “wetlands.” *See*, Act 13, § 3215(b)(1)-(3). However, Section 3215(b)(4) then provides, “The department shall waive the distance restrictions upon submission of a plan identifying additional measures, facilities or practices to be employed during well site construction, drilling and operations necessary to protect the waters of this Commonwealth. The waiver, if granted, shall include additional terms and conditions required by the department necessary to protect the waters of this Commonwealth.” *Id.* at § 3215(b)(4).

220. As described above, Chapter 33 of Act 13 relates to oil and gas operations and local ordinances. Section 3304, entitled “Uniformity of local ordinances” provides, in addition to essentially requiring that oil and gas operations be permitted in all zones, the maximum setbacks that local ordinances can specify for oil and gas operations.

221. The broad delegation provided for in Section 3215(b)(4) is an unconstitutional delegation of legislative powers to an executive administrative agency in violation of the non-delegation doctrine.

222. The non-delegation doctrine is rooted in Article I of the U.S. Constitution and Articles II, IV, and V of the Pennsylvania Constitution which vests legislative powers in the legislative branches. A law that combines executive authority with the functions of the legislature eliminates the checks and balances built into the Constitution, thereby violating the separation of powers principle.

223. Specifically, Article II, § 1 of the Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”

224. By legislative act, there must be some “intelligible principle to which the person or body authorized to take action is directed to conform.” *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989). The court must step in where the legislature has, “...failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.” *Id.* at 374.

225. The Pennsylvania Supreme Court has similarly stated that, “[i]t is a well-settled maxim that under our theory of the separation of powers of government, the legislative, judicial and executive, the powers of each branch must be preserved to it; the legislature cannot delegate its powers to enact laws directly or indirectly to any other body or government agency.” *Wilson et ux. v. School Dist. of Philadelphia et al.*, 195 A. 90, 93 (Pa. 1937). The General Assembly must set adequate standards and guidelines for the agency delegated to execute or administer a law. *Blackwell v. Com. State Ethics Com’n*, 567 A.2d 630, 637 (Pa. 1989). The “prohibition

against delegation of legislative powers requires that the basic policy choices be made by the General Assembly.” *Id.* (emphasis in original).

226. “It is axiomatic that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *Eagle Environmental II, L.P. v. Commonwealth of Pennsylvania, Department of Environmental Protection*, 584 Pa. 494, 517, 884 A.2d 867, 880 (2005) (internal quotations and citations omitted). Although the Legislature may confer authority and discretion in connection with the execution of the law “[t]he principal limitations on this power are twofold: (1) the basic policy choices must be made by the Legislature; and (2) the legislature must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.” *Id.*

227. Section 3215 grants to Operators *the right* to obtain a variance from the distance restrictions (e.g. “shall be granted a variance...” and “[t]he department shall waive the distance requirements” *See supra.*). However, despite the fact that the Department has *no choice but to grant* the variance of these distance restrictions, Act 13 wholly fails to specify how far into these minimum distance requirements the Department of Environmental Protection can allow an operator to encroach and what specific safeguards or standards need to be met. To be certain, requiring “submission of a plan identifying additional measures, facilities or practices to be employed...necessary to protect the waters of this Commonwealth” as the only requirement for the grant of the waiver or variance does not supply any guidance whatsoever relative to how much the distance requirement can be reduced or what measures need to be employed to protect surrounding citizens or waterways.

228. Thus, under the “guidance” of Act 13, so long as an Operator says it will protect the waters of the Commonwealth, the Department, which *must* allow the Operator to encroach upon the minimum distance requirements, can conceivably allow the Operator to encroach upon

the setback to the point of nullifying it; the Operator could construct its well site within ten (10) feet of a building, stream, spring, body of water or wetland without trying to meet any specific standards. This essentially obviates the need to comply with a setback.

229. Section 3215(b)(4) fails to set forth any guiding standards or policy initiatives with which to limit the discretion of the Pennsylvania DEP. While the law states that the DEP shall grant waivers, it is entirely unclear what will be deemed “necessary” to protect the water of the Commonwealth. It is likewise unclear as to what “additional terms and conditions” should be required for the protection of Commonwealth waters. As a result, the DEP will be permitted to make legislative policy judgments otherwise reserved for the General Assembly.

230. The practical application of Act 13 demonstrates not only that it is internally inconsistent and contradictory, but that it wholly fails to provide adequate guidance to the Department for purposes of enforcing and administering the law. This results in the Department having *de facto* legislative power and ability to make basic policy choices regarding distance requirements and therefore violating the non-delegation doctrine of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of the non-delegation doctrine embodied in the United States and Pennsylvania Constitutions;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT IX- VAGUENESS

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

IX. Petitioners seek a declaration that Act 13 is unconstitutionally vague because its setback provisions and requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.

231. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

232. “A law may be unconstitutionally vague and thus violate the Due Process Clause of the United States Constitution if it fails to provide the necessary information such that an ordinary citizen could understand what conduct is prohibited.” *Eagle Environmental II, L.P.*, 584 Pa. at 517, 884 A.2d at 881.

233. As set forth above, Act 13 sets forth distance requirements for oil and gas well sites and related operations from buildings, streams, springs, bodies of water and wetlands, but allows for the reduction of these distance requirements and requires the Department of Environmental Protection to allow such reductions with unfettered discretion. *See supra*.

234. Additionally as described above, Act 13 mandates these distance requirements for municipalities, requiring that any local zoning ordinance governing oil and gas operations strictly comply with the same. Act 13, § 3304(b).

235. However, Act 13 wholly fails to provide any meaningful information or guidance to municipalities with regard to when to grant a waiver or variance of the distance requirements pursuant to Section 3215(a) and (b).

236. Where an Operator seeks and receives its mandatory waiver of the distance requirements from the Department of Environmental Protection, it is reasonable to conclude that the Operator actually intends to install or construct its well site or related facilities within that distance requirement. For a municipality that has in place an ordinance that complies with Act 13, § 3304, the question then becomes what procedure is required. Included here would be the

questions of whether the Operator also has to seek a variance from the distance requirements set forth in the local ordinance; whether the municipality has to treat the Department's grant of waiver or variance as an automatic waiver or variance of the local ordinance; and whether the municipality will be given time in addition to the strict 30-day period prescribed by Section 3304(b)(4) for a municipality to issue a permit for permitted uses by right.

237. Act 13 is silent on these very practical and very real questions despite the fact it provides for significant punishment to a municipality that does not comply with its requirements. The result is that it is unclear as to what actions are prohibited and what actions are allowed such that municipalities will necessarily be kept from performing their duties to protect the health, safety, welfare and morals of their communities. These failures render Act 13 unconstitutionally vague and invalid.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1061(b)(2) and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of the Due Process Clause of the United States Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT X – VAGUENESS

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

- X. Petitioners seek a declaration that Act 13 is unconstitutionally vague because its timing and permitting requirements for municipalities fail to provide the necessary information regarding what actions of a municipality are prohibited.**

238. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

239. “A law may be unconstitutionally vague and thus violate the Due Process Clause of the United States Constitution if it fails to provide the necessary information such that an ordinary citizen could understand what conduct is prohibited.” *Eagle Environmental II, L.P.*, 584 Pa. at 517, 884 A.2d at 881.

240. Section 3304(b)(4) requires that “[i]n order to allow the [sic] for the reasonable development of oil and gas resources, a local ordinance:...(4) Shall have a review period for permitted uses [by right] that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.”

241. Section 3304(b)(5.1), as set forth above in full (*supra*, ¶ 47), requires that municipalities allow: well sites and impoundments in all districts as permitted uses by right; compressor stations as permitted uses by right in agricultural and industrial zones and as conditional uses in all other zones; and natural gas processing plants as permitted uses by right in industrial zones and conditional uses in agricultural zones. On its face, Act 13 requires municipalities to “permit” all of these activities within the time constraints provided.

242. Regardless of whether a particular use is defined as a permitted use by right or a conditional use within a particular zone, if that use contemplates subdivision and land development, in all instances the municipality is required to undertake procedures pursuant to the Subdivision and Land Development Act (“SALDO”), (Article V of the Pennsylvania Municipal Planning Code) to ensure that the actual plans and construction of the use satisfy these requirements. *See* Article V of the MPC. Procedures for permitting pursuant to the SALDO are statutorily required to ensure the health, safety, welfare and morals of the community with regard to all land development within the municipality. *See id.* This is especially important for intense industrial uses that include large structures and significant modifications to the land. Oil and gas

operations, by all accounts, **are intense industrial uses**. For instance, the natural gas processing plant located in Houston, Pennsylvania occupies a 100-acre site. *See* Exhibit 12.

243. Procedures under the SALDO require the approval of the Board of Supervisors in order for a Zoning Officer to approve or “permit” the application, which in turn requires a public meeting in which the applicant demonstrates compliance with the SALDO and allows the Board of Supervisors to determine the same. *See* Article V of the MPC. However, pursuant to well-settled existing law, the governing authorities of a municipality, including the board of supervisors and the planning commission, are only required to meet once per month. *See*, 53 P.S. § 65603. Under the timing constraints of Act 13, these governing bodies will be required to meet multiple times in excess of their monthly meeting to handle the significant amount of applications for well sites, impoundments, compressor stations and processing plants that can be expected, substantially increasing the cost to taxpayers. Considering that municipalities in areas of heavy drilling, such as Mt. Pleasant Township, which has hundreds of wells drilled before the implementation of Act 13, the number of applications and the time, cost and burden on municipalities can be expected to increase exponentially under the industry-friendly Act 13. As such, the time, expense, and burden of having to comply with the requirement that a permit be issued within 30 days for a permitted use by right and within 120 days for a conditional use is wholly unrealistic.

244. Finally, in all circumstances under the SALDO, a Board of Supervisors has the ability to deny the application for failing to meet the requirements of the law. Likewise, an aggrieved individual has the right to appeal the Board’s decision in approving or denying the application under the SALDO. *See*, Article V of the MPC.

245. The SALDO process itself consists of several stages with different levels of planning and review involved. To fit such layered procedures within a limited specific time

constraint is a near impossibility. Where some of Municipal Petitioners' Boards generally meet only once a month, a thirty (30) day timeframe for issuance of the permit would effectively void the entire SALDO process. Because the logistics are unrealistic, it is unclear to Municipal Petitioners whether the terms of Act 13 are meant to preempt the SALDO process, and grant the oil and gas industry an exemption from compliance with those provisions. Accordingly, Act 13 is unconstitutionally vague.

246. Thus, in placing an inflexible 30-day time period to permit certain oil and gas operations within the municipality, Act 13 wholly fails to address the actual requirements and procedures necessary and required for a municipality to comply with before approving even uses defined as "permitted." In doing so, Act 13 places the municipality in the untenable position of either attempting to comply with Act 13 by issuing the permit within the express time constraints, or to violate the statutory—and constitutionally required—procedures it is required to follow **for every single other use**.

247. As with other practical considerations and effects that the General Assembly wholly failed to consider with this special law for the oil and gas industry, Act 13 is entirely silent upon what it means for a municipality to "permit" these industrial uses. The necessary and inevitable result of this is that municipalities are left to either follow the procedural requirements imposed upon them by statute for every single use and risk violating Act 13—and face the severe sanctions it imposes—or purportedly comply with Act 13 and ignore these procedural requirements necessary for municipality's actions in zoning to be constitutional.

248. Act 13 is therefore unconstitutionally vague and therefore invalid under the Due Process Clause of the United States Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1061(b)(2) and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of the Due Process Clause of the United States Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XI – DECLARATORY JUDGMENT

Mehernosh Khan, M.D., v. Commonwealth of Pennsylvania et al.

- XI. Petitioners seek a declaration that Act 13 is an unconstitutional “special law” in violation of Article III, Section 32 of the Pennsylvania Constitution which restricts health professionals’ ability to receive and disclose critical diagnostic information when dealing solely with information deemed proprietary by the natural gas industry.**

249. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

250. The General Assembly, through Section 3222.1(b)(11) of Act 13 created an unconstitutional special law that is solely applicable to and only favors the natural gas industry. Section 3222.1(b)(11) imposes restrictions on health professionals’ abilities and obligations to disclose critical diagnostic information necessary for medical treatment solely because such information has been deemed by the natural gas industry as “proprietary” or a “trade secret.” The General Assembly has singled out the natural gas industry for special treatment and protection not afforded to any other industry:

If a health professional determines that a **medical emergency** exists and the **specific identity and amount of any chemicals** claimed to be a trade secret or confidential proprietary information are necessary for emergency treatment, the vendor, service provider or operator shall immediately disclose the information to the health professional upon a verbal

acknowledgment by the health professional that the **information may not be used for purposes other than the health needs asserted** and that the health professional shall maintain the information as **confidential**. The vendor, service provider or operator may request, and the health professional **shall provide** upon request, a written **statement of need** and a **confidentiality agreement** from the health professional as soon as circumstances permit, in conformance with regulations promulgated under this chapter.

Act 13, § 3222.1(b)(11).

251. Chemicals, including products with multiple chemical compounds and so called “proprietary or trade secret substances,” are used daily in a wide spectrum of occupations and industries throughout Pennsylvania. The widespread use of chemicals in a myriad of daily activities can result in human exposure with adverse health effects that may result in disease, illness, and the exacerbation of pre-existing conditions in a person.

252. To prevent such illnesses from occurring, companies in the business of manufacturing chemical products are required to create Material Safety Data Sheets (MSDS) that identify each chemical component of the product it is selling. Within that MSDS sheet, a chemical product manufacturer is required to list not only the toxicity of each chemical constituent that makes up the product, but also all of the known adverse health effect, of each chemical component. *See*, OSHA Law & Regulations, Hazard Communication Standard, attached hereto as Exhibit 46.

253. In practical effect, under the Hazard Communication Laws promulgated by the Occupational Safety and Health Administration, for example, an employer must provide copies of, or access to, every MSDS for every product used or found in that work place so that proper worker precautions, health and safety protections, and disclosures are made. *See*, Exhibit 46. In the event that a human exposure to any of these chemicals results in an adverse health effect, the worker has information available to him regarding his exposures to share with his treating physicians.

254. The sharing of this information between patient and doctor is not only critical to determine what the disease is, but is equally as important to share between treating physicians, like emergency room doctors, and specialists to afford a patient competent medical care and treatment.

255. In order for a physician to completely and properly treat a patient, it is imperative that a physician make a proper and correct diagnosis of the ailment. To do so, a doctor must consider all of the patient's symptoms as well as his/her occupational, social, medical, and environmental history to perform what is known as a differential diagnosis. A differential diagnosis is a process by which a doctor "rules in" or takes into consideration and then "rules out" specific illness or disease process based upon a full disclosure of all of a patient's symptoms, prior medical history, as well as occupational and environmental exposures.

256. Once a differential diagnosis is made, a doctor, in order to give competent medical care, must perform what is known as a differential etiology. In this process, a doctor is required to "rule in" and then "rule out" all possible causes of the patient's disease or illness. It is critically imperative when performing a differential etiology that the doctor has complete information regarding all of the patient's past medical, social, occupational and environment exposure history to properly determine the source or cause of the patient's illness or disease.

257. Many times, in particular with exposure induced diseases, an emergency room doctor or primary care physician must, in order to properly and competently diagnose and treat a patient, refer such a patient to a specialist like an occupational or environmental physician or toxicologist, doctors trained to diagnose and treat patients with illnesses and diseases resulting from chemical exposures in the workplace and living environments. In that referral relationship, the emergency room doctor or primary care physician must share with the specialist his/her

knowledge of the patient's exposures including any and all chemical exposures whether they are proprietary or not in order for the specialist to competently diagnose and treat that patient.

258. A physician's ability to share not only diagnostic test results, like MRIs, x-rays, or blood tests, but a patient's history of exposure to specific chemicals and the dose and duration of the patient's exposure to those chemicals, even if only qualitative, is not only necessary to properly treat and diagnose a patient but is an essential tool of practicing competent medicine. It is for this reason alone that many hospitals, doctors' offices, and treating institutions have computerized all patients' files so they can be accessed by all of the patient's doctors in order to accurately and consistently share critical patient specific information to properly treat each individual patient.

259. As such, without complete information, such as a full chemical exposure history, a doctor could very easily improperly diagnose and treat a patient, making his/her illness worse not better, and thus, opening himself up to a claim of medical malpractice.

260. Pennsylvania law re-emphasizes the importance of openness among health professionals in the process of evaluating and treating illness by imposing numerous affirmative duties on health professionals to ensure that critical and essential information related to the treatment of human illnesses is shared and readily available:

- a. Physicians are **required** to keep medical records that:
 - i. Accurately, legibly, and **completely** reflect the evaluation treatment of the patient. 49 Pa. Code §16.95(a);
 - ii. Must contain clinical information pertaining to the patient that has been accumulated by the physician or the physician's agents. 49 Pa. Code §16.95(c);
 - iii. Must contain diagnoses, findings, or results of pathologic or clinical laboratory examination, radiology examination, medical and surgical treatment and other therapeutic procedures. 49 Pa. Code §16.95(d);
- b. Healthcare practitioners have an obligation to report certain diseases, infections and medical conditions, including cancer. 28 Pa. Code §27.21a(b)(2);

- c. Practitioners regulated by the Pennsylvania Board of Medicine are subject to disciplinary action if the offer, undertake or agree to treat a disease by a secret method, procedure treatment or medicine or by refusing to disclose the means, method, or procedure that the practitioner has treated a human condition to the Board of Medicine upon demand of the Board. 49 Pa. Code §16.61(a)(12);
- d. Practitioners regulated by the Pennsylvania Board of Medicine are subject to discipline if they fail to act in such a manner as to present an immediate and clear danger to public health or safety. 63 P.S. §422.41(9).

261. Knowledge and the sharing of information has been the keystone to the development of medical knowledge and treatment techniques for centuries. In fact, **Pennsylvania laws** impose mandatory obligations on health professionals to report their findings in their medical records, thereby sharing with other health care professionals. 35 P.S. §§ 563.1-563.13. *See*, Pennsylvania Record Keeping Requirements, attached hereto as Exhibit 47. Section 3222.1(b)(11) of Act 13 prohibits health professionals from making **any** disclosure of information that they receive regarding chemicals that the natural gas industry deems as “proprietary” or “trade secrets” **even when such a disclosure is necessary to treat a particular patient or to protect public health.** *See*, Act 13 §3222.1(b)(11). Under Section 3222.1(b)(11) of Act 13, health professionals are prohibited from sharing with other physicians any knowledge that they have gained from disclosures by the natural gas industry related to “proprietary” substances or “trade secrets” for any purpose other than treating an emergent condition. *Id.*

262. Thus, under Act 13, an emergency room doctor who sees a patient with a suspected chemically induced disease who is provided by the industry with a disclosure of the chemicals the patient was exposed to would be prohibited from practicing competent medicine as he would not be permitted to share that disclosed chemical exposure information with the specialist he is referring the patient to in order to receive the proper medical care.

263. Moreover, Act 13 only requires the dissemination of trade secret or proprietary chemical information from the industry in “emergency” situations, this restriction again, forces doctors to practice irresponsible and dangerous medicine.

264. According to the list of chemical additives used in the hydraulic fracturing process that the industry has disclosed, many of them contain toxic, hazardous, and cancer causing agents like benzene. Benzene has been rated a Class I carcinogen by the International Agency for Research on Cancer (IARC), the cancer research arm of the World Health Organization (WHO). Obtaining a rating of a Class I carcinogen by IARC means that it has been determined by physicians around the world, through shared information, human and animal studies that a particular chemical causes cancer in human beings. Benzene has been rated a Class I carcinogen primarily on its ability to cause leukemia, in particular acute myeloid leukemia (AML), according to IARC’s monograph on benzene. However, as demonstrated by IARC’s research, benzene does not cause cancer in an “emergency situation” or within hours or days of exposure. Rather, benzene’s ability to cause leukemia may manifest itself over a period of years, sometimes within five years and sometimes as long as twenty years after a person’s initial exposure to it.

265. Under Act 13, a patient presenting a doctor with symptoms of AML would not do so under an “emergency” situation given the number of years it takes to develop the disease after a patient’s first exposure. As such, under Act 13, that patient’s doctor would be unable, even upon request to obtain “trade secret or proprietary” information regarding the chemicals the patient was exposed to determine if the patient’s AML was caused by exposure to oil and gas hydraulic fracturing products. Thus, the ability of the doctor to perform half of his required medical analysis, the differential etiology, what caused the patient’s AML, is eliminated.

266. The ability to determine the cause of the patient's AML, in this example, is paramount to practicing competent medicine because if the doctor determines the cause to be benzene in a propriety chemical used in the oil and gas industry, and the patient is still working or living near and being exposed to that oil and gas source of benzene, the doctor needs to know that information to recommend the greatest deterrent for reoccurrence and exacerbation of that AML, removal of the patient from the exposure source, benzene in that proprietary oil and gas hydraulic fracturing product.

267. Act 13, strips physicians of their ability to practice competent medical care and in turn opens them up to unintentionally committing malpractice by not being afforded the ability to obtain all proprietary and/or trade secret chemical information simply because a patient does not present with symptoms that rise to the level of an immediate or "emergency" situation.

268. As such, with respect to human medical conditions potentially related to or caused by exposure to chemicals deemed "trade secrets" or "proprietary" by the natural gas industry, the Pennsylvania General Assembly has decreed that there will be no body of medical knowledge developed through the interchange of ideas between health professionals, health professionals have no right to access such "trade secrets" or "proprietary" information in a non-emergent situation and that health professionals are not permitted to use any knowledge or experience they have gained treating one patient exposed to such substance to diagnose and assist another patient in a similar situation.

269. Section 3222.1(b)(11) of Act 13 requires health professionals to disregard general ethical duties and affirmative regulatory and statutory obligations and hide information that they have gained solely because it was produced by an industry favored by the General Assembly.

270. The numerous ethical, regulatory, and statutory obligations of health professionals that are apparently no longer applicable to situations involving potential exposure to a chemical

deemed a “trade secret” or “proprietary” by the natural gas industry exemplify how Section 322.1(b)(11) of Act 13 is a special law.

271. As noted *supra*, the General Assembly is permitted to make distinctions between members in a class if such designation is based on manifest peculiarities that distinguish a subgroup from the general class. *Appeal of Ayars* 122 Pa. 266, 281, 16 A. 356, 363 (1889). However, when the General Assembly makes a distinction between members of a class that is artificial and arbitrary, such legislation is an unconstitutional special law. *See*, Pa. Const. Art. 3 § 32; *See, Commonwealth v. Puder*, 261 Pa. 129, 136, 104 A. 505, 506 (1918).

272. The artificiality of the distinction between the natural gas industry and all other educational, commercial and industrial users of chemicals is readily apparent when one analyzes Section 322.1(b)(11) of Act 13 in conjunction with the aforementioned list of health professionals’ obligations. For decades, humans have developed medical conditions as a result of exposure to chemical substances and health professionals have had affirmative duties and obligations to make record of this information have shared it with colleagues. Now, despite this history, the General Assembly, in an effort to promote and protect the natural gas development industry, has prescribed a regime of rules and regulations, manifested through Section 322.1(b)(11) of Act 13 that apply **only** to that particular industry despite the fact that “trade secrets” or chemical exposure is not unique to this industry. *LaPlacca v. Philadelphia Rapid Transit Co.*, 265 Pa. 304, 308, 108 A. 612, 613. (Pa. 1919).

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 32 of the Pennsylvania Constitution;
- II. For a decree to permanently enjoin future application of Act 13; and

- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XII – DECLARATORY JUDGMENT

Mehernosh Khan, M.D., v. Commonwealth of Pennsylvania et al.

- XII. Petitioners seek a declaration that Act 13’s restriction on health professionals’ ability to disclose critical diagnostic information is an unconstitutional violation of the single-subject rule enunciated in Article III, Section 3 of the Pennsylvania Constitution.**

273. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

274. The expressed purpose of Act 13, as prominently displayed on the cover of its predecessor, House Bill 1950, was to amend Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes.

275. Section 3222.1(b)(11) of Act 13 imposes restrictions upon health professionals’ ability to disclose and share information related to medical treatment.

276. Health professionals are regulated under Title 35 of the Pennsylvania Consolidated Statutes and the subjects of restrictions on health professionals in their care of patients is wholly different than amendment of statutes related to oil and gas development.

277. Because section 3222.1(b)(11) of Act 13 promulgates statutory restrictions on health professionals who are not within the regulatory scheme of Title 58, the Act violates the single-subject requirement of Article III, Section 3 of the Pennsylvania Constitution.

WHEREFORE, pursuant to Pa. R. Civ. Pro. 1602 and the Declaratory Judgments Act, 42 Pa.C.S.A. § 7532, *et seq.*, Petitioners respectfully demand judgment in their favor and against the Defendants as follows:

- I. For a decree declaring and adjudging that Act 13 is an unconstitutional violation of Article III, Section 3 of the Pennsylvania Constitution;

- II. For a decree to permanently enjoin future application of Act 13; and
- III. For such other relief as the Court may deem just and proper, including attorneys fees and costs.

COUNT XIII – PRELIMINARY INJUNCTION

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

278. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

279. Act 13 is an unconstitutional legislative enactment in violation of the Pennsylvania and United States Constitution.

280. The issuance of a preliminary injunction is necessary to prevent immediate and irreparable harm to Petitioners that cannot be compensated by monetary damages alone.

281. Petitioners will be significantly irreparably injured by enforcement of the Act as it will cost considerable money to amend ordinances, change zoning districts and revise entire comprehensive plans of the Municipal Petitioners. Additionally, Act 13 places a burden upon Petitioners to either act in violation of the U.S. and Pennsylvania Constitutions or statutory law. Petitioners face the possibility of attorney fees and costs, and potential civil liability from taxpayers and residents. The harm to the Petitioners is immediate, and the Petitioners have no other lawful means with which to stay the enactment of Act 13 which is unconstitutional.

282. These injuries cannot be quantified and the Petitioners have no adequate remedy at law regarding the same.

283. The injunctive relief sought by the Petitioners will not result in greater harm to the Defendants than would be suffered by the Petitioners if the injunctive relief is not granted.

284. Granting the Petitioners the request preliminary injunctive relief is in the public interest.

285. By virtue of the foregoing, the Petitioners have demonstrated a likelihood of success on the merits and that a balance of the equities favors the issuance of a preliminary injunction against Defendants to stay enactment of the unconstitutional legislation.

WHEREFORE, Petitioners, respectfully requests this Honorable Court:

- I. Enter a Preliminary Injunction enjoining enactment of Act 13;
- II. Award the Petitioners any further relief, including attorneys' fees and costs, as this Court deems just and proper.

COUNT XIV – PERMANENT INJUNCTION

Robinson Township et al. v. Commonwealth of Pennsylvania et al.

286. All other paragraphs of this Petition are incorporated by reference as though set forth fully herein.

287. Act 13 is an unconstitutional legislative enactment in violation of the Pennsylvania and United States Constitution which will be enforced as law in the foreseeable future.

288. The issuance of a mandatory permanent injunction is necessary to prevent immediate and irreparable harm to Petitioners that cannot be compensated by monetary damages alone.

289. Petitioners will be significantly irreparably injured by enforcement of the Act as it will cost considerable money to amend ordinances, change zoning districts and revise entire comprehensive plans of the Municipal Petitioners. Act 13 places a burden upon Petitioners to either act in violation of the U.S. and Pennsylvania Constitutions or statutory law. Furthermore, Petitioners face the possibility of attorney fees and costs, and potential civil liability from taxpayers and residents. The harm to the Petitioners is immediate, and the Petitioners have no other lawful means with which to stay the enactment of Act 13 which is unconstitutional.

290. These injuries cannot be quantified and the Petitioners have no adequate remedy at law regarding the same.

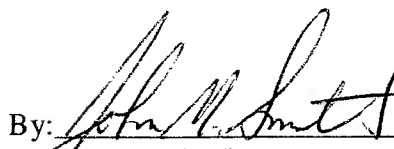
291. The injunctive relief sought by the Petitioners will not result in greater harm to the Defendants than would be suffered by the Petitioners if the injunctive relief is not granted.

292. Granting the Petitioners the request permanent injunctive relief is in the public interest.

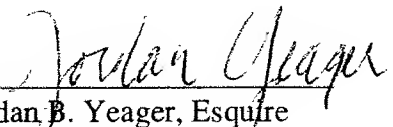
WHEREFORE, Petitioners, respectfully requests this Honorable Court:

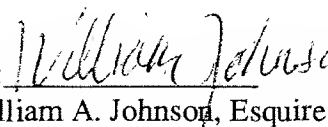
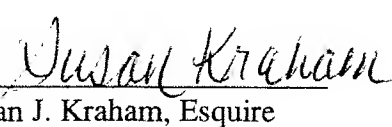
- I. Enter a Permanent Injunction enjoining enactment of Act 13;
- II. Award the Petitioners any further relief, including attorneys' fees and costs, as this Court deems just and proper.

Respectfully submitted,

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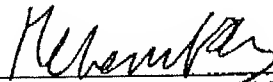
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Counsel for Petitioners

VERIFICATION

I, Mehernosh Khan, M.D., have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.



Mehernosh Khan, M.D.

3/28/2012

VERIFICATION

I, Deron Gabriel, have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

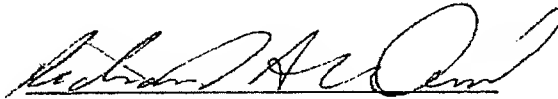


Deron Gabriel
Council President,
Township of South Fayette

VERIFICATION

I, Township Manager of the Township of Robinson, have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

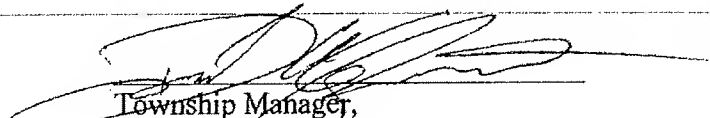
A handwritten signature in black ink, appearing to read "Richard A. [unclear]", is written over a horizontal line.

Township Manager,
Township of Robinson

VERIFICATION

I, Township Manager of the Township of Cecil, have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.



Township Manager,
Township of Cecil

VERIFICATION

I, Brian Coppola, have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

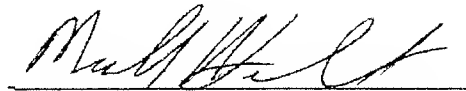


Brian Coppola

VERIFICATION

I, Michael A. Silvestri, Manager of Peters Township, have read the foregoing
**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.** The statements therein are
correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904
relating to unsworn falsification to authorities, which provides that if I make knowingly false
statements, I may be subject to criminal penalties.

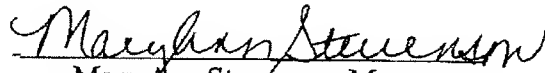
A handwritten signature in cursive script, appearing to read 'Michael A. Silvestri', written over a horizontal line.

Michael A. Silvestri, Manager
of Peters Township

VERIFICATION

I, Mary Ann Stevenson, Manager of Mt. Pleasant Township, have read the foregoing
**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.** The statements therein are
correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa.C.S. §4904
relating to unsworn falsification to authorities, which provides that if I make knowingly false
statements, I may be subject to criminal penalties.


Mary Ann Stevenson, Manager
of Mt. Pleasant Township

VERIFICATION

I, David M. Ball, have read the foregoing **PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**. The statements therein are correct to the best of my personal knowledge or information and belief.

This statement and verification is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false statements, I may be subject to criminal penalties.

David M Ball 03-28-12
David M. Ball

CERTIFICATE OF SERVICE

I, John M. Smith, do hereby certify that a true and correct copy of the foregoing Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief was served via United States Certified Mail on this 29th day of March 2012, to the following:

Commonwealth of Pennsylvania
c/o Linda L. Kelly, Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

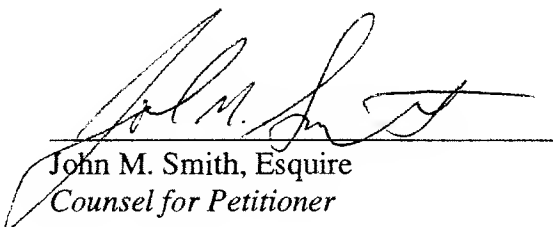
Pennsylvania Public Utility Commission
c/o Robert F. Powelson, Chairman
400 North Street, Keystone Building
Harrisburg, PA 17120

Robert F. Powelson
Pennsylvania Public Utility Commission
Chairman
400 North Street, Keystone Building
Harrisburg, PA 17120

Office of the Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Linda L. Kelly
Attorney General, Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120
Michael L. Krancer
Pennsylvanian Department of Environmental
Protection, Secretary
400 Market Street
Harrisburg, PA 17120

Pennsylvania Department of the
Environmental Protection
c/o Michael L. Krancer, Secretary
400 Market Street
Harrisburg, PA 17120


John M. Smith, Esquire
Counsel for Petitioner

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Canonsburg, PA 15317
(724) 745-5121
jmsmith@smithbutzlaw.com